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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-6259

INEZ MOORE,
Appellant

-vs-

CITY OF EAST CLEVELAND, OHIO
Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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ATTORNEY FOR APPELLANT

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO.

INEZ MOORE,
Defendant-Appellant

-vs-

CITY OF EAST CLEVELAND, OHIO
Plaintiff-Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT

The appellant appeals from the judgment of the Supreme Court of Ohio, entered on November 28, 1975, affirming a judgment of the Court of Appeals of Ohio, Eighth District, County of Cuyahoga upholding the constitutionality of a zoning ordinance of the City of East Cleveland, Ohio. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

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OPINION BELOW

There was no opinion filed by the Supreme Court of Ohio with its final judgment dismissing the appeal. The court held that no substantial constitutional questions existed. The opinion on the merits was delivered at an earlier stage in the proceeding when the Court of Appeals of Ohio, Eighth District, County of Cuyahoga affirmed the judgment of the East Cleveland Municipal Court denying the defendant's motion to dismiss and finding the defendant guilty. The opinion of the Court of Appeals is unreported but set forth in the Appendix, infra, at pp. 3a-13a.

JURISDICTION

The decision and judgment of the Supreme Court of Ohio was filed on November 28, 1975. Notice of Appeal was filed in the Supreme Court of Ohio on February 20, 1976. The jurisdiction of this Court to review the decision by appeal is conferred by 28 U.S.C. Sec. 1257(2) and is sustained by the following decisions: Cohen v. California, 403 U.S. 15 (1971); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

ORDINANCES INVOLVED

Section 1351.02 (1966) of the Ordinances of the City of East Cleveland provides:

> The occupancy of any dwelling unit shall be limited to one and only one, family and to any authorized persons occupying such dwelling unit with such family.

Section 1341.08 (1966) of the Ordinances of the City of East Cleveland provides:

"Family" means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

(a) Husband or wife of the nominal head of the household.

(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

(e) A family may consist of one individual.
(Ord. 5744. Passed 7-26-66).

QUESTION PRESENTED

Whether the City of East Cleveland, Ohio, consistent with the First, Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, may punish the Appellant for violation of an ordinance which prohibits five blood related family members, as opposed to people living together in a communal arrangement, from living together solely because they do not constitute a "family" as defined by the ordinance. The five people include the appellant, her two natural sons, and their respective natural sons.

STATEMENT OF THE CASE

The appellant was fined $25.00 and sentenced to five days in jail because her two sons and their respective sons, the appellant's natural grandsons, lived with her in her single family home. The judgment and sentence came about solely because these five closely related blood relatives, living together, did not meet the narrow definition of "family" imposed by Section 1341.08 of the Codified Ordinances of the City of East Cleveland, Ohio.

The criminal complaint was made by a housing inspector for violation of Section 1351.02 of the Codified Ordinances of the City of East Cleveland, Ohio. This ordinance provides that a dwelling unit shall be occupied by one family as defined by Section 1341.08 of the ordinances.

The federal constitutional questions sought to be reviewed were first raised in the trial court by a motion to dismiss. The Court denied the motion to dismiss and found the appellant guilty of violating Section 1351.02 and entered judgment. (App., infra, p. 4a).

The constitutional questions were considered on appeal by the Court of Appeals which upheld the conviction in a 2 - 1 decision. (App., infra, pp. 3a-13a). The appellant then raised the constitutional issues on appeal to the Supreme Court of Ohio which dismissed the appeal. The court found that no substantial constitutional question exists but did not write an opinion. (App., infra, p. 1a-2a).

The majority opinion of the Court of Appeals characterized the issues before it in the following manner:

> Sec. 1341.08 does not involve the rights of association, travel or privacy nor other "fundamental" right guaranteed by the United States Constitution. Therefore, defendant's argument that Sec. 1341.08 violates her rights of association, travel and privacy is without merit. (App., infra, p. 6a).

The majority found that Section 1341.08 does not violate the equal protection clauses and disagreed with appellants argument that the ordinance is unreasonable and arbitrary on its face. (App., infra, p. 7a).

However, Presiding Judge Jack G. Day in his dissent stated:

> The intereference with a blood related group living as a family, qua family, is arbitrary, unreasonable, and capricious on its face and, therefore, violates due process of law. (App., infra, p. 10a).

The dissenting opinion noted that the right to determine one's association without governmental inference is invested with a special gravity when the association in question involves the family and that the instant case involves a definition of family so arbitrary and so ill suited to the regulation of population density that the presence of the "unequal hand" is patent.

THE QUESTIONS ARE SUBSTANTIAL

Section 1341.08 of the Ordinances of the City of East Cleveland represents a heavy handed intrusion on a highly valued institution, the American family. The opinions of the lower courts have sanctioned this invasion of the fundamental constitutional rights of the appellant.

The ordinance,if allowed to stand, will effectively contribute to the destruction of the Appellant's extended family and other similar traditional family units which have historically been afforded a special and privileged legal position. Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908, at 911 (1970).

I. THE ORDINANCE VIOLATES THE APPELLANT'S RIGHT OF FREE ASSOCIATION.

The decisions of this court have established that the First Amendment and its embodiment in the Fourth Amendment generally protect the right of human association from governmental intrusion. NAACP v. Britton, 371 U.S. 415, 430 (1963).

The family is one of the most important modes of association and the center of human feeling and trust. This Court has given special associational protection to this most traditional of human groupings. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

The East Cleveland ordinance clearly denies the appellant her right to association with her family.

II. THE ORDINANCE VIOLATES THE APPELLANT'S RIGHT OF PRIVACY.

There is a vital relationship between the freedom of association and the constitutional right of privacy. Mr. Justice Brandeis defined privacy as "against the Government, the right to be let alone...the right most valued by civilized man." Olmstead v. United States, 277 U.S. 438,

478 (1928) (dissenting opinion).

The Appellant's personal decision to establish a home is a right guaranteed by the Fourteenth Amendment. Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring).

The appellant's choice to include family members as companions in her home involves deeply personal considerations relating to the quality of relationships therein. Her decision is within the concept of the right to privacy protected by the constitution. Village of Belle Terre v. Boraas, 416 U.S. 1, 16 (1974) (Marshall, dissenting).

III. THE ORDINANCE VIOLATES THE APPELLANT'S RIGHT TO EQUAL PROTECTION OF THE LAW.

The East Cleveland ordinance creates a definition of "family" which infringes upon the fundamental rights of freedom of association and the right to privacy. The application of strict equal protection scrutiny is therefore required.

When it is shown that a classification has these characteristics, the ordinance can withstand judicial scrutiny only when it is shown that the burden imposed on the individual constitutional rights is necessary to protect a compelling and substantial governmental interest. Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The City of East Cleveland did not offer one shred of evidence in the trial court to demonstrate such an interest.

Assuming, however, that the Appellee did prove that a compelling state interest exists, the task of demonstrating that no less intrusive means exists which will adequately protect the compelling state interest is upon the party seeking to justify the burden. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Speiser v. Randall, 357 U.S. 513 (1958); Shelton v. Tucker, 364 U.S. 479 (1960); NAACP v. Britton, 371 U.S. 415 (1963); NAACP v. Alabama, 377 U.S. 288 (1964).

The Appellee has failed to demonstrate that an alternative means less threatening to the appellant's fundamental constitutional rights is unavailable. If the intent of the City in enacting and enforcing Sec. 1341.08 is to control density, then it is blatantly obvious that the city can avail itself of an existing law which is much less invasive of the fundamental rights of privacy and free association.

Section 1351.03 provides an adequate density control scheme which is constitutionally acceptable. (App., infra, p. 13a).

Even if it is assumed that no fundamental right is involved and that the "rational basis" test should be applied, the ordinance still violates the Fourteenth Amendment. The stated goal of the ordinance are to alleviate traffic congestion and to save the school district money. (App., infor. p. 7 a). There is no rational relationship between these purposes and the classifications set up in Sec. 1341.08.

The ordinance forbids one class, an extended family of five members, such as the appellant's, from living together. However, the same law permits a family of twenty members to live together if they are of consanguinity one degree closer than that of the appellant's family.

The Equal Protection Clause denies to the city the power to decide by legislation that different treatment be accorded to persons placed by an ordinance into different classes on the basis of criteria wholly unrelated to the ordinance.

The classification must be reasonable, not arbitrary, and must rest upon a ground of difference having a fair and substantial relationship to the purpose of the legislation. All persons in similar circumstances must be treated alike. Reed v. Reed, 404 U.S. 71, 76 (1971); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

The ordinance in question represents the type of arbitrary legislative choice forbidden by the Constitution. By providing dissimilar treatment for families which are similarly situated, the ordinance violates the equal protection clause. Reed v. Reed, supra.

IV. THE ORDINANCE VIOLATES THE APPELLANT'S RIGHT TO DUE PROCESS OF LAW.

Zoning ordinances violate the due process clause when they do not bear a substantial relation to the public health, safety, morals or general welfare. Nectow v. City of Cambridge, 277 U.S. 183 (1928); Euclid v. Ambler Realty, 272 U.S. 365 (1926).

The East Cleveland ordinance at issue is an attempt to enforce the city's personal preference on the appellant and is not substantially related to a legitimate government objective. It is an arbitrary and capricious exercise of power inconsistent with appellant's right to due process under the law.

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

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3408 Lorain Avenue
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Legal Aid Society of Cleveland

ATTORNEY FOR APPELLANT

APPENDIX

APPENDIX

SC 7-A

BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 75 TERM
To wit: November 28, 1975

Inez Moore,
Appellant,

vs.

City of East Cleveland,
Appellee.

No. 75-896

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS

for CUYAHOGA *County*

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Legal Aid Society

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

SC-10A

BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 75 TERM
To wit: November 28, 1975

Inez Moore,
Appellant,

vs.

City of East Cleveland,
Appellee.

No. 75-896

APPEAL FROM THE COURT OF APPEALS

for CUYAHOGA *County*

This cause, here on appeal as of right from the Court of Appeals for CUYAHOGA *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for CUYAHOGA *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this.....day of..... 19.....

.....*Clerk*

.....*Deputy*

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 33888

City of East Cleveland

APPELLEE

-vs-

Inez Moore

APPELLANT

APPEAL FROM

EAST CLEVELAND MUNI. COURT

No. 163,307

JOURNAL ENTRY

DATE July 18, 1975

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the East Cleveland Municipal Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the East Cleveland Municipal Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On January 16, 1974 the defendant-appellant, Inez Moore, was cited by an East Cleveland deputy housing inspector for violation of Sec. 1351.02 of Ordinance 6010 of the City of East Cleveland. (All references to code sections are to the Ordinances of the City of East Cleveland unless otherwise indicated.) The defendant was residing in her home with her sons, Dale Moore and John Moore, and their sons Dale Moore, Jr. and John Moore, Jr. Sec. 1351.02 provides that a dwelling unit shall be occupied by only one family, and under the definition in Sec. 1341.08 the defendant, her sons and grandsons constitute more than one family. The notice of violation served upon the defendant alleged that John Moore, Jr., age 7, was an illegal occupant of her dwelling.

The defendant entered a plea of not guilty to the charge and filed a motion to dismiss the action on the ground that Sec. 1341.08 is unconstitutional.

On May 17, 1974 the court denied the motion to dismiss and found the defendant guilty of violating Sec. 1351.02. The court entered judgment against her and she now appeals assigning one error:

> The lower court erred in overruling Appellant's motion for dismissal upon the grounds that the ordinances in question were unconstitutional as violations of Appellant's rights to freedom of association, travel, privacy, and Appellant's rights to equal protection under the laws and due process of law.

The question of the constitutionality of Sec. 1341.08 was before this court in Hilson v. City of East Cleveland (Court of Appeals No. 30544, 1971) in which we held that the ordinance as applied by Sec. 1351.02 was not unconstitutionally void for vagueness. The two ordinances read as follows:

> "1351.02 LIMITATION ON OCCUPANCY.
> "The occupancy of any dwelling unit shall be limited to one, and only one, family and to any authorized persons occupying such dwelling unit with such family."

> "1341.08 FAMILY.
> "'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:
> "(a) Husband or wife of the nominal head of the household.
> "(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.
> "(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.
> "(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent

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person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

"(e) A family may consist of one individual."

In the instant case, the defendant specifically challenges subsection (d) of Sec. 1341.08 and argues that it is an irrational exercise of legislative power because it so narrowly defines the word "family." She argues further that since she and her two sons and two grandsons are a traditional blood-related family, they should be able to live together in the same dwelling free from unreasonable governmental interference. Yet under the definition of Sec. 1341.08(d) the defendant's family is more than one family and Sec. 1351.02 proscribes their living together in the same dwelling unit.

The defendant contends that Sec. 1341.08 should be struck down because it violates her constitutionally guaranteed "fundamental" rights of association, travel and privacy. Furthermore, she argues that the ordinance transgresses the equal protection and due process clauses of the United States Constitution. For the reasons set forth below, we find all of these arguments to be without merit.

In Village of Belle Terre v. Boraas (1974), 416 U.S. 1, the Supreme Court recently considered the constitutionality of an ordinance enacted in a small New York community which defined "family" as,

> "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."

The constitutionality of the ordinance had been challenged by a group of more than two unrelated students living together as a single housekeeping unit in a single family dwelling. Speaking for the majority of the court which affirmed the constitutionality of the ordinance, Mr. Justice Douglas noted,

> "The present ordinance is challenged on several grounds: that it interferes with a person's right to travel;...that it bars people who are uncongenial to the present residents;...that the restriction of those whom the neighbors do not like trenches on the newcomers' rights of privacy;..."
>
> "We find none of these reasons in the record before us. It is not aimed at transients....It involves no 'fundamental' right guaranteed by the Constitution, such as...the right of association,...or any rights of privacy,..."
>
> 416 U.S. at 7.

In Belle Terre the Supreme Court held that the town ordinance defining a family involved no "fundamental" right guaranteed by Constitution. That holding is equally applicable to the instant case.

Sec. 1341.08 does not involve the rights of association, travel or privacy nor any other "fundamental" right guaranteed by the United States Constitution. Therefore, the defendant's argument that Sec. 1341.08 violates her rights of association, travel and privacy is without merit. See also: Palo Alto Tenants Union v. Morgan (1970), 321 F. Supp. 908 and Rademan v. City of County of Denver (1974), 526 P. 2d 1325.

Considering the defendant's final contentions -- that Sec. 1341.08 is violative of the equal protection and due process clauses -- we note that the Constitution of the State of Ohio, Section 3, Article XVIII states:

> "municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The purpose underlying the enactment of all East Cleveland Housing Code Ordinances is set forth in Sec. 1343.02 as follows:

> "...to establish minimum standards necessary to make all dwelling structures safe, sanitary, free from fire and health hazards, and fit for human habitation and beneficial to the public welfare; to establish minimum standards governing the maintenance of dwelling structures in such condition as will not constitute a blighting or deteriorating influence on the neighborhood and the community; to protect property values

> and to maintain the character and appearance of the community and neighborhoods within the community; to fix responsibilities for owners and occupants of dwelling structures with respect to sanitation, repair and maintenance;...."

Two reasons for eancting and enforcing Sec. 1341.08 are mentioned by counsel for East Cleveland in his brief: 1) to help alleviate traffic congestion, and 2) to lessen the possible financial burden on the city school system which would result from an inordinate number of school age children residing in a single dwelling which would consequently generate a disproportionately small real estate tax revenue per child.

The defendant failed to present the trial court with any evidence to support her contention that Sec. 1341.08 is violative of the equal protection and due process clauses. Rather she rests on the assertion in her appellate brief, that the ordinance is unreasonable and arbitrary on its face. We disagree.

A municipal ordinance enacted pursuant to the legislative exercise of local police power is valid unless it clearly bears no real and substantial relation to public health, safety, morals or general welfare. Benjamin v. City of Columbus (1957), 167 Ohio St. 103; Curtiss v. Cleveland (1959), 170 Ohio St. 127.

As this court recently stated in syllabus 3 of Alsenas v. City of Brecksville (1972), 29 Ohio App. 2d 255:

> "To prevail in such a case the complainant must also clearly establish that the ordinances he attacks do not bear a real and substantial relation to the public health, safety, morals or general welfare and are, in turn, unreasonable or arbitrary, that is, in substance, that the local legislative authority could not have reasonably believed or, in permitting such legislation to remain in force, cannot reasonably believe that the necessity of regulation in the public interest outweighs, qualitatively, the impact imposed on the individual property owner."

A duly enacted municipal ordinance is presumed to be constitutionally valid. The burden of establishing the unconstitutionality of such an ordinance is upon the one challenging its validity. Cleveland v. Antonio (1955), 100 Ohio App. 334.

7a

Since the defendant presents no evidence to rebut the presumption of legislative validity, we find that Sec. 1341.08 bears a real and substantial relation to public health, safety or welfare and is, therefore, valid. See City of East Cleveland v. Palmer (1974), 40 Ohio App. 2d 10.

Affirmed.

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GERALD E. FUERST
By Regina Marjuch

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the E. Cleve. Muni. Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DAY, P.J., DISSENTS (See dissenting opinion attached);

MANOS, J.,

SILBERT, J., CONCUR.

PRESIDING JUDGE
JACK G. DAY

(Silbert, J., retired judge of the 8th appellate district, sitting by assignment.)

N.B. This entry is made pursuant to the third sentence of Rule 22D, Ohio Rules of Appellate Procedure. This is an announcement of decision, (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

For plaintiff appellee: Leonard Young
For defendant appellant: Frank Murtaugh

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...S MAILED TO COUNSEL FOR ...L PARTIES. — COSTS TAXED.

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COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

NO. 33888

City of East Cleveland

PLAINTIFF— APPELLEE

-vs-

Inez Moore

DEFENDANT-APPELLANT

APPEAL FROM

EAST CLEVELAND MUNICIPAL COURT

No. 163,307

JOURNAL ENTRY

DISSENTING OPINION

DATE July 18, 1975

DAY, J., DISSENTING:

Respectfully, I dissent.

In this case a grandmother was fined $25 and sentenced to five days in jail because two sons and their respective sons, her grandsons, lived with her in a single family house. The judgment and sentence comes about because the defendant's family configuration does not meet the definition imposed by the East Cleveland ordinance which is set out in the margin and underlined. 1/

1/ "1341.08 FAMILY.

"'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

"(a) Husband or wife of the nominal head of the household.

"(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

"(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

"(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished him by the nominal head of the household and the spouse of the nominal head of the household.

"(e) A family may consist of one individual. (Ord. 5744. Passed 7-26-66.)"

9a

I.

In 1971 an entry of this court held the ordinance not "unconstitutionally vague", Hilson v. City of East Cleveland, Case No. 30544. That decision is not dispositive of the present issue. For the vice of that part of the ordinance involved in the instant case is not that it is vague. Its very precision is an element in its unconstitutionality. The interference with a blood related group living as a family, qua family, is arbitrary, unreasonable, and capricious on its face and, therefore, violates due process of law.

II.

Few constitutional rights are more important than the right to determine one's associations without governmental interference, NAACP v. Alabama (1958), 357 U.S. 449, 460-462, 2 L. Ed. 2d 1488, 1498-1499. The right is invested with special gravity when the association in question involves the family or race, cf. Loving v. Virginia (1967), 388 U.S. 1, 7-9, 18 L. Ed. 2d 1010, 1015-1016. It is fundamental that even a legitimate governmental ojbective, when its pursuit affects constitutional rights, is tested by the availability of alternative means less threatening to liberty:

> ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means of achieving the same purpose." (emphasis supplied) Shelton v. Tucker (1960), 364 U.S. 479, 489; NAACP v. Button (1963), 371 U.S. 415, 423; NAACP v. Alabama (1964), 377 U.S. 288, 307-308. 2/

2/ Indeed the least inhibiting means may be required. See fn. 29 of Mr. Justice Brennan's concurrence in Abington School District v. Schempp (1963), 374 U.S. 203, 265, 10 L. Ed. 2d 844, 883, and cases collected there.

10a

If the ordinable objective is to regulate housing density in the interest of health, safety and welfare - a legitimate city objective and the only discernible one - there "are less drastic means of achieving the same purpose" and the City has, in fact, already utilized one of them.

Ordinance 1351.03 of the City of East Cleveland makes elaborate provision for regulating the condition and size of habitable floor areas in the City including a standard number of square feet per occupant.[3] Without assessing the validity of the standards in Ordinance 1351.03, it is obvious that its density control scheme is an approach less invasive of the right of association and directly relevant to a health, safety and welfare purpose than the definition in Ordinance 1341.08(d).

III.

Whether and to what extent government has constitutional authority to define and regulate living groupings other than a family related by blood can be left to another time. But even if the state may intervene within federally approved limits, see Village of Belle Terre v. Boraas (1974), 416 U.S. 1, 7-9, 39 L. Ed. 2d 797, 803-804, that does not mean that a state constitution may not impose higher obstacles to government interference. Federal constitutional safeguards are a floor not a ceiling, Oregon v. Hass (1975), ___ U.S. ___, 43 L. Ed. 2d 570, 575-576; Cooper v. California (1967), 386 U.S. 58, 62, 17 L. Ed. 2d 730, 734. But decision in the present case need not founder on Belle Terre in any event. For that case is not germane to this case. The ordinance Belle Terre approved did not define a family to exclude persons "related by blood from living together as a family".

3/ Ordinance 1351.03(e) provides:
"Every dwelling unit shall contain at least 150 square feet of habitable floor area for the first occupant thereof and at least 100 additional square feet of habitable floor area for every additional occupant thereof, but in no case shall any dwelling unit conta less than 250 square feet of habitable floor area."

IV.

There is another constitutional frailty inherent in Ordinance 1341.08's definition of the family. It does not define a reasonable category which can pass the tests for validity under the equal protection clause.[4]

In utilizing the family definition in issue, a classification was established which is suspect because it involves the fundamental right to association, NAACP v. Alabama, id., in the privacy of the family, cf. Loving v. Virginia, id. 388 U.S. at 11-12, 18 L. Ed. 2d at 1017-1018; and Griswold v. Connecticut (1965), 381 U.S. 479, 485-487, 14 L. Ed. 2d 510, 515-516. When it is shown that a classification has these characteristics, the state (city) must show some compelling state interest to justify it, Shapiro v. Thompson (1969), 394 U.S. 618, 634, 638, 22 L. Ed. 2d 600, 615, 617. At very least the State has not shown a compelling state interest that could not have been satisfied by alternate means.

When the classification is neither suspect nor invasive of a fundamental right, it still must rationally be related to a legitimate governmental goal if it is to avoid the taint of arbitrariness, Reed v. Reed (1971), 404 U.S. 71, 75-77, 30 L. Ed. 2d 225, 229-230. Rational relationship departs from the classification here when it attempts to regulate the composition of family to accomplish an end served as well or better under another ordinance (see fn. 3, supra).

Finally, legislation which comports with equal protection must impose its regulation impartially, Yick Wo v. Hopkins (1886), 118 U.S. 356, 373-374, 30 L. Ed. 220, 227:

4/ McGowan v. Maryland (1961), 366 U.S. 420, 6 L. Ed. 2d 393, involved Sunday closing laws. The statutes were upheld using the test that it must stand if "any state of facts reasonably may be conceived to justify it", cf. 366 U.S. at 425-426, 6 L. Ed. 2d at 399. The fundamental rights involved here were not involved in McGowan and different principles apply here.

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The instant case involves a definition of family so arbitrary and so ill suited to the regulation of population density that the presence of the "unequal hand" is patent. It does "make unjust and illegal discriminations between persons in similar circumstances" with consequences which are material to their rights.

I would declare Ordinance 1341.08(d) unconstitutional in the parts pertinent to this case, reverse the judgment, and discharge the defendant.

1351.03 HABITABLE FLOOR AREA.

Every dwelling unit shall conform to the following standards:

(a) No portion of any room which does not presently meet all of the requirements for habitable rooms under any section of this Housing Code shall be included in determining the habitable floor area of a dwelling unit.

(b) Every dwelling unit shall have not less than 250 square feet of habitable floor area and shall contain at least one room which shall have not less than 150 square feet of habitable floor area and which is not less than ten feet in width; provided further that no room used to compute compliance with such 250 square foot minimum limitation shall be less than seven feet in width nor have less than seventy square feet of habitable floor area.

(c) No portion of any room which is less than seven feet in width shall be included in determining habitable floor area.

(d) All habitable rooms shall have a clear ceiling height of not less than seven feet, provided that rooms with sloping ceilings shall have a clear ceiling height of not less than six feet, nine inches in at least one-half of their habitable floor area. In determining the habitable floor area of rooms with sloping ceilings, all portions of less than five feet in height shall be disregarded.

(e) Every dwelling unit shall contain at least 150 square feet of habitable floor area for the first occupant thereof and at least 100 additional square feet of habitable floor area for every additional occupant thereof, but in no case shall any dwelling unit contain less than 250 square feet of habitable floor area.

(f) The third floor area of a double house, of a two-family dwelling or of a multi-family dwelling consisting of side-by-side dwelling units, sometimes known as row houses, shall be used to compute compliance with the requirements for minimum habitable floor area for a family occupying a dwelling unit in such double house, two-family dwelling or multi-family dwelling to the extent permitted by subsection (1) hereof, but subject to the requirements and limitations of subsection (2) hereof, as follows:

(1) A. Where there are two separate approved stairways from the third floor area to the ground floor of such building, seventy-five percent of the habitable floor area of the third floor shall be used to compute compliance with the requirements for minimum habitable floor area for a family occupying a dwelling unit in a double house or multi-family dwelling or occupying the second floor of a two-family dwelling;

B. Where there is only one approved stairway from the third floor area to the ground floor of such building, fifty percent of the habitable floor area of the third floor shall be used to compute compliance with the requirements for minimum habitable floor area for a family occupying a dwelling unit in a double house or multi-family dwelling or occupying the second floor of a two-family dwelling.

C. For the purpose of this subsection, "approved stairway" means a stairway which satisfies the requirements of rules and regulations adopted pursuant to Section 1345.09.

(2) A. No portion of the habitable floor area on the third floor shall be used to compute compliance with the requirements for minimum habitable floor area for a family occupying a dwelling unit on the first floor of a two-family dwelling.

B. No portion of the floor area on the third floor used for storage purposes shall be included in determining the habitable floor area of such third floor.

C. No portion of any room on the third floor which does not presently meet all of the requirements for habitable rooms under any section of this Housing Code shall be included in determining the habitable floor area of such third floor.

D. No portion of the habitable floor area on the third floor of any dwelling shall be used to compute compliance with the requirements for minimum habitable floor area for a family occupying a dwelling unit in such dwelling unless such family has the exclusive use, other than for storage purposes, of such third floor. (Ord. 5798. Passed 1-24-67.)

15a

IN THE SUPREME COURT OF THE STATE OF OHIO

NO. 75-896

INEZ MOORE	:
Appellant	:
-vs-	:
CITY OF EAST CLEVELAND, OHIO	:
Appellee	:

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Inez Moore, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of November 28, 1975 affirming the judgment of Conviction, entered herein on May 17, 1974.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

FRANCIS MAGUIGH, JR.
Attorney for Inez Moore, Appellant
Legal Aid Society of Cleveland
3408 Lorain Avenue
Cleveland, Ohio 44113

Filed February 23, 1976

PROOF OF SERVICE

AFFIDAVIT

I, FRANCIS MURTAUGH, JR., Attorney for Inez Moore, appellant herein, depose and say that on the 20th day of February, 1976, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the City of East Cleveland, Ohio, appellee herein, by mailing a copy in a duly addressed envelope, first class postage prepaid, to its counsel of record, Henry B. Fisher, Director of Law, The City of East Cleveland, 14340 Euclid Avenue, East Cleveland, Ohio 44112.

All parties required to be served have been served.

FRANCIS MURTAUGH, JR.

Subscribed and Sworn to, before me, at Cleveland, Ohio this_____day of February, 1976.

17a

Supreme Court, U. S.
FILED
JUN 25 1976
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-6289

INEZ MOORE,

Appellant

—vs—

CITY OF EAST CLEVELAND, OHIO,

Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO

FILED FEBRUARY 26, 1976
PROBABLE JURISDICTION NOTED APRIL 26, 1976

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-6289

INEZ MOORE,

Appellant

—vs—

CITY OF EAST CLEVELAND, OHIO,

Appellee

ON APPEAL FROM THE SUPREME COURT OF OHIO

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Relevant Docket Entries

The Municipal Court of East Cleveland, Ohio

4-3-74 Criminal Complaint filed.

5-17-74 Motion to Dismiss filed along with brief.

5-17-74 Motion to Dismiss based on unconstitutionality of applicable ordinance was overruled. Finding of Guilty upon stipulation of defense counsel. Defendant was fined $25 fine and 5 days. Fine and days suspended if condition corrected by 7-1-74. Execution stayed on condition defendant duly perfects Appeal herein.

6-13-74 Notice of Appeal filed.

Relevant Docket Entries

Court of Appeals of Ohio, Eighth District

1-29-75 Notice of Appeal and Transcript and copies of original papers from East Cleveland Municipal Court filed.

7-28-75 Judgment of the East Cleveland Municipal Court affirmed. Dissenting Opinion.

8-25-75 Notice of Appeal to the Supreme Court of Ohio filed by Appellant.

Relevant Docket Entries

Supreme Court of Ohio

9-24-75 Notice of Appeal and Memorandum of Appellant filed.

11-5-75 Memorandum of Appellee filed.

11-28-75 Motion to Certify overruled. Dismissed sua sponte, no substantial constitutional question involved.

2-20-76 Notice of Appeal to the U.S. Supreme Court filed.

3-10-76 Certified transcript mailed to the U.S. Supreme Court.

CRIMINAL COMPLAINT
THE MUNICIPAL COURT OF EAST CLEVELAND, OHIO

IN THE EAST CLEVELAND MUNICIPAL COURT

[DEFENDANT'S COPY]

COMPLAINT (City Ordinance)

THE STATE OF OHIO)
CUYAHOGA COUNTY) ss.
CITY OF EAST CLEVELAND)

BEFORE ME, Esther W. Patch, Deputy Clerk of the East Cleveland Municipal Court, personally came Raiford Williams who being duly sworn according to law, deposes and says, that on or about the 30th day of January, A.D. 1974, at the City of East Cleveland, County of Cuyahoga and State of Ohio, one Inez Moore being the owner of premises at 1854-56 Garfield including a two family dwelling structure, did unlawfully permit two families to occupy a single family dwelling unit of said structure contrary to the form of an Ordinance of said City in such cases made and provided, to wit: Section 1351.02 of Ordinance 6010. Further deponent sayeth not.

/s/ Raiford Williams

Sworn to and subscribed before me, this 3rd day of April A.D. 1974.

/s/ Esther W. Patch
Deputy Clerk
of the East Cleveland
Municipal Court

MOTION TO DISMISS
THE MUNICIPAL COURT OF EAST CLEVELAND, OHIO

Case No. 163 307

IN THE EAST CLEVELAND MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO

CITY OF EAST CLEVELAND

—*vs*—

INEZ MOORE

MOTION TO DISMISS

Now comes the defendant and respectfully moves this Court to dismiss the criminal complaint filed in the above referenced case for the reasons stated in the attached brief.

Respectfully submitted,

/s/ Frank Murtaugh
FRANK MURTAUGH
Attorney for Defendant
Legal Aid Society of Cleveland
2269 Professor Avenue
Cleveland, Ohio 44113
216-696-1560

SERVICE

A copy of this motion was served personally on the Prosecutor of the City of East Cleveland on May 17, 1974.

/s/ Frank Murtaugh
FRANK MURTAUGH

BRIEF

THE ORDINANCES

Section 1351.02 of the Codified Ordinances of the City of East Cleveland, Ohio limits the occupancy of a dwelling unit to one family.

The Code defines family:

1341.08 Family.

"Family" means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

(a) Husband or wife of the nominal head of the household.

(b) Unmarried children of the nominal head of the household

or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

(e) A family may consist of one individual. (Ord. 5744. Passed 7-66).

FACTS

The defendant has stipulated that the following individuals reside in the dwelling unit in question: Inez Moore, the defendant; John Moore Sr., the defendant's son; John Moore Jr., John Moore Sr.'s son; Dale Moore, the defendant's son; Dale Moore Jr., Dale Moore Sr.'s son. The City of East Cleveland contends that these five people, all blood relatives, are two families.

LEGAL CLAIMS

The City alleges that the Moore family's living arrangement violates Section 1351.02 and 1341.08 of the Codified Ordinances of the City of East Cleveland. The Defendant, at this time, does not challenge the constitutionality of Section 1351.02.

However, Section 1341.08 is unconstitutional on its face. This section violates the defendant's rights:

(a) To Due Process and Equal Protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution in that there is no compelling interest or rational basis to limit occupancy to a "family" as defined in Section 1341.08; *Nectow* v. *City of Cambridge*, 277 U.S. 183, 188 48 S. Ct. 447, 448 (1928); *Euclid* v. *Ambler Realty Company*, 272 U.S. 265, 47 S. Ct. 114 (1926).

(b) To Freedom of Association guaranteed by the First and Fourteenth Amendments to the United States Constitution. *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1972).

(c) To travel and reside in the place of her choice as guaranteed by the privileges and immunity clause of Article IV, Section 2 of the United States Constitution, and by the First and Fourteenth Amendments to the United States Constitution. *Shapiro* v. *Thompson*, 394 U.S. 618, 89 S. Ct. 1322, (1969).

(d) To Privacy as guaranteed by the First and Fourteenth Amendments to the United States Constitution. *Griswold* v. *Connecticut*, 381 U.S. 479, 495 (1965).

(e) To Due Process and Equal Protection of Laws in that defendant will suffer substantial economic injury and loss if one or both of her sons is required to vacate her home.

Traditional American families have enjoyed a rightfully favored position in the history of American jurisprudence. The ordinance at issue clearly has a detrimental affect on the Moore family and others similarly situated. The ordinance does not represent a valid exercise of delegated state police power. The rights of the defendant and her family must be guaranteed and protected.

For these reasons, the defendant requests that this Court find the ordinance to be unconstitutional and dismiss the complaint.

Respectfully submitted,

/s/ Frank Murtaugh
FRANK MURTAUGH

OPINION AND JOURNAL ENTRY
COURT OF APPEALS OF OHIO, EIGHTH JUDICIAL DISTRICT

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

No. 33888

CITY OF EAST CLEVELAND, APPELLEE

—*vs*—

INEZ MOORE, APPELLANT

DATE—July 18, 1975

APPEAL FROM EAST CLEVELAND MUNI. COURT

No. 163,307

JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the East Cleveland Municipal Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the East Cleveland Municipal Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On January 16, 1974 the defendant-appellant, Inez Moore, was cited by an East Cleveland deputy housing inspector for violation of Sec. 1351.02 of Ordinance 6010 of the City of East Cleveland. (All references to code sections are to the Ordinances of the City of East Cleveland unless otherwise indicated.) The defendant was residing in her home with her sons, Dale Moore and John Moore, and their sons Dale Moore, Jr. and John Moore, Jr. Sec. 1351.02 provides that a dwelling unit shall be occupied by only one family, and under the

definition in Sec. 1341.08 the defendant, her sons and grandsons constitute more than one family. The notice of violation served upon the defendant alleged that John Moore, Jr., age 7, was an illegal occupant of her dwelling.

The defendant entered a plea of not guilty to the charge and filed a motion to dismiss the action on the ground that Sec. 1341.08 is unconstitutional.

On May 17, 1974 the court denied the motion to dismiss and found the defendant guilty of violating Sec. 1351.02. The court entered judgment against her and she now appeals assigning one error:

> The lower court erred in overruling Appellant's motion for dismissal upon the grounds that the ordinances in question were unconstitutional as violations of Appellant's rights to freedom of association, travel, privacy, and Appellant's rights to equal protection under the laws and due process of law.

The question of the constitutionality of Sec. 1341.08 was before this court in *Hilson* v. *City of East Cleveland* (Court of Appeals No. 30544, 1971) in which we held that the ordinance as applied by Sec. 1351.02 was not unconstitutionally void for vagueness. The two ordinances read as follows:

> "1351.02 LIMITATION ON OCCUPANCY.
>
> "The occupancy of any dwelling unit shall be limited to one, and only one, family and to any authorized persons occupying such dwelling unit with such family."
>
> "1341.08 FAMILY.
>
> "'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:
>
> "(a) Husband or wife of the nominal head of the household.

> "(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.
>
> "(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.
>
> "(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.
>
> "(e) A family may consist of one individual."

In the instant case, the defendant specifically challenges subsection (d) of Sec. 1341.08 and argues that it is an irrational exercise of legislative power because it so narrowly defines the word "family." She argues further that since she and her two sons and two grandsons are a traditional blood-related family, they should be able to live together in the same dwelling free from unreasonable governmental interference. Yet under the definition of Sec. 1341.08(d) the defendant's family is more than one family and Sec. 1351.02 proscribes their living together in the same dwelling unit.

The defendant contends that Sec. 1341.08 should be struck down because it violates her constitutionally guaranteed "fundamental" rights of association, travel and privacy. Furthermore, she argues that the ordinance transgresses the equal protection and due process clauses of the United States Constitution. For the reasons set

forth below, we find all of these arguments to be without merit.

In *Village of Belle Terre* v. *Boraas* (1974), 416 U.S. 1, the Supreme Court recently considered the constitutionality of an ordinance enacted in a small New York community which defined "family" as,

> "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."

The constitutionality of the ordinance had been challenged by a group of more than two unrelated students living together as a single housekeeping unit in a single family dwelling. Speaking for the majority of the court which affirmed the constitutionality of the ordinance, Mr. Justice Douglas noted,

> "The present ordinance is challenged on several grounds: that it interferes with a person's right to travel; . . . that it bars people who are uncongenial to the present residents; . . . that the restriction of those whom the neighbors do not like trenches on the newcomer rights of privacy; . . ."
>
> "We find none of these reasons in the record before us. It is not aimed at transients. . . . It involves no 'fundamental' right guaranteed by the Constitution, such as . . . the right of association, . . . or any rights of privacy, . . ."
>
> 416 U.S. at 7.

In *Belle Terre* the Supreme Court held that the town ordinance defining a family involved no "fundamental" right guaranteed by Constitution. That holding is equally applicable to the instant case.

Sec. 1341.08 does not involve the rights of association, travel or privacy nor any other "fundamental" right guaranteed by the United States Constitution. Therefore, the defendant's argument that Sec. 1341.08 violates

her rights of association, travel and privacy is without merit. See also: *Palo Alto Tenants Union* v. *Morgan* (1970), 321 F. Supp. 908 and *Rademan* v. *City of County of Denver* (1974), 526 P. 2d 1325.

Considering the defendant's final contentions—that Sec. 1341.08 is violative of the equal protection and due process clauses—we note that the Constitution of the State of Ohio, Section 3, Article XVIII states:

> "municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The purpose underlying the enactment of all East Cleveland Housing Code Ordinances is set forth in Sec. 1343.02 as follows:

> ". . . to establish minimum standards necessary to make all dwelling structures safe, sanitary, free from fire and health hazards, and fit for human habitation and beneficial to the public welfare; to establish minimum standards governing the maintenance of dwelling structures in such condition as will not constitute a blighting or deteriorating influence on the neighborhood and the community; to protect property values and to maintain the character and appearance of the community and neighborhoods within the community; to fix responsibilities for owners and occupants of dwelling structures with respect to sanitation, repair and maintenance; . . ."

Two reasons for enacting and enforcing Sec. 1341.08 are mentioned by counsel for East Cleveland in his brief: 1) to help alleviate traffic congestion, and 2) to lessen the possible financial burden on the city school system which would result from an inordinate number of school age children residing in a single dwelling which would consequently generate a disproportionately small real estate tax revenue per child.

The defendant failed to present the trial court with any evidence to support her contention that Sec. 1341.08 is violative of the equal protection and due process clauses. Rather she rests on the assertion in her appellate brief, that the ordinance is unreasonable and arbitrary on its face. We disagree.

A municipal ordinance enacted pursuant to the legislative exercise of local police power is valid unless it clearly bears no real and substantial relation to public health, safety, morals or general welfare. *Benjamin* v. *City of Columbus* (1957), 167 Ohio St. 103; *Curtiss* v. *Cleveland* (1959), 170 Ohio St. 127.

As this court recently stated in syllabus 3 of *Alsenas* v. *City of Brecksville* (1972), 29 Ohio App. 2d 255:

> "To prevail in such a case the complainant must also clearly establish that the ordinances he attacks do not bear a real and substantial relation to the public health, safety, morals or general welfare and are, in turn, unreasonable or arbitrary, that is, in substance, that the local legislative authority could not have reasonably believed or, in permitting such legislation to remain in force, cannot reasonably believe that the necessity of regulation in the public interest outweighs, qualitatively, the impact imposed on the individual property owner."

A duly enacted municipal ordinance is presumed to be constitutionally valid. The burden of establishing the unconstitutionality of such an ordinance is upon the one challenging its validity. *Cleveland* v. *Antonio* (1955), 100 Ohio App. 34.

Since the defendant presents no evidence to rebut the presumption of legislative validity, we find that Sec. 1341.08 bears a real and substantial relation to public health, safety or welfare and is, therefore, valid. See

City of East Cleveland v. *Palmer* (1974), 40 Ohio App. 2d 10.

Affirmed.

[Received for Filing Jul. 18, 1975, Gerald E. Fuerst, By Peggy [Illegible]]

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the E. Cleve. Muni. Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure, Exceptions.

DAY, P. J., DISSENTS (See dissening opinion attached);

MANOS, J.

SILBERT, J., CONCUR.

(Silbert, J., retired judge of the 8th appellate district, sitting by assignment.)

/s/ Jack G. Day
JACK G. DAY
Presiding Judge

N.B. This entry is made pursuant to the third sentence of Rule 22D, Ohio Rules of Appellate Procedure. This is an announcement of decision, (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

For plaintiff appellee: Leonard Young

For defendant appellant: Frank Murtaugh

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

No. 33888

APPEAL FROM
EAST CLEVELAND MUNICIPAL COURT

No. 163,307

CITY OF EAST CLEVELAND, PLAINTIFF-APPELLEE

—*vs*—

INEZ MOORE, DEFENDANT-APPELLANT

DATE—July 18, 1975

JOURNAL ENTRY

DISSENTING OPINION

DAY, J., DISSENTING:

Respectfully, I dissent.

In this case a grandmother was fined $25 and sentenced to five days in jail because two sons and their respective sons, her grandsons, lived with her in a single family house. The judgment and sentence comes about because the defendant's family configuration does not meet the definition imposed by the East Cleveland ordinance which is set out in the margin and underlined.[1]

---

[1] "1341.08 FAMILY.

" 'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

"(a) Husband or wife of the nominal head of the household.

"(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

"(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

"(d) *Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child.* For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished him by the nominal head of the household and the spouse of the nominal head of the household.

["(e) A family may consist of one individual. (Ord. 5744, Passed 7-26-66.)"]

I.

In 1971 an entry of this court held the ordinance not "unconstitutionally vague", *Hilson* v. *City of East Cleveland,* Case No. 30544. That decision is not dispositive of the present issue. For the vice of that part of the ordinance involved in the instant case is not that it is vague. Its very precision is an element in its unconstitutionality. The interference with a blood related group living as a family, qua family, is arbitrary, unreasonable, and capricious on its face and, therefore, violates due process of law.

II.

Few constitutional rights are more important than the right to determine one's associations without governmental interference, *NAACP* v. *Alabama* (1958), 357 U.S. 449, 460-462, 2 L. Ed. 2d 1488, 1498-1499. The right is invested with special gravity when the association in question involves the family or race, cf. *Loving* v. *Virginia* (1967), 388 U.S. 1, 7-9, 18 L. Ed. 2d 1010, 1015-1016. It is fundamental that even a legitimate governmental objective, when its pursuit affects constitutional rights, is tested by the availability of alternative *means* less threatening to liberty:

> ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly

achieved. The breadth of legislative abridgment must be viewed in the light of *less drastic means* of achieving the same purpose." (emphasis supplied) *Shelton* v. *Tucker* (1960), 364 U.S. 479, 489; *NAACP* v. *Button* (1963), 371 U.S. 415, 423; *NAACP* v. *Alabama* (1964), 377 U.S. 288, 307-308.[2]

If the ordinable objective is to regulate housing density in the interest of health, safety and welfare—a legitimate city objective and the only discernible one—there "are less drastic means of achieving the same purpose" and the City has, in fact, already utilized one of them.

Ordinance 1351.03 of the City of East Cleveland makes elaborate provision for regulating the condition and size of habitable floor areas in the City including a standard number of square feet per occupant.[3] Without assessing the validity of the standards in Ordinance 1351.03, it is obvious that its density control scheme is an approach less invasive of the right of association and directly relevant to a health, safety and welfare purpose than the definition in Ordinance 1341.08(d).

III.

Whether and to what extent government has constitutional authority to define and regulate living groupings other than a family related by blood can be left to another time. But even if the state may intervene within federally approved limits, see *Village of Belle Terre* v. *Boraas* (1974), 416 U.S. 1, 7-9, 39 L. Ed. 2d 797, 803-804, that does not mean that a state constitution

[2] Indeed the least inhibiting means may be required. See fn. 29 of Mr. Justice Brennan's concurrence in *Abington School District* v. *Schempp* (1963), 374 U.S. 203, 265, 10 L. Ed. 2d 844, 883, and cases collected there.

[3] Ordinance 1351.03(e) provides:

"Every dwelling unit shall contain at least 150 square feet of habitable floor area for the first occupant thereof and at least 100 additional square feet of habitable floor area for every additional occupant thereof, but in no case shall any dwelling unit contain less than 250 square feet of habitable floor area."

may not impose higher obstacles to government interference. Federal constitutional safeguards are a floor not a ceiling, *Oregon* v. *Haas* (1975), —— U.S. ——, 43 L. Ed. 2d 570, 575-576; *Cooper* v. *California* (1967), 386 U.S. 58, 62, 17 L. Ed. 2d 730, 734. But decision in the present case need not founder on *Belle Terre* in any event. For that case is not germane to this case. The ordinance *Belle Terre* approved did *not* define a family to *exclude* persons "related by blood from living together as a family".

IV.

There is another constitutional frailty inherent in Ordinance 1341.08's definition of the family. It does not define a reasonable category which can pass the tests for validity under the equal protection clause.[4]

In utilizing the family definition in issue, a classification was established which is suspect because it involves the fundamental right to association, *NAACP* v. *Alabama*, *id.*, in the privacy of the family, cf. *Loving* v. *Virginia*, *id.* 388 U.S. at 11-12, 18 L. Ed. 2d at 1017-1018; and *Griswold* v. *Connecticut* (1965), 381 U.S. 479, 485-487, 14 L. Ed. 2d 510, 515-516. When it is shown that a classification has these characteristics, the state (city) must show some compelling state interest to justify it, *Shapiro* v. *Thompson* (1969), 394 U.S. 618, 634, 638, 22 L. Ed. 2d 600, 615, 617. At very least the State has not shown a compelling state interest that could not have been satisfied by alternate means.

When the classification is neither suspect nor invasive of a fundamental right, it still must rationally be related to a legitimate governmental goal if it is to avoid the taint of arbitrariness, *Reed* v. *Reed* (1971), 404 U.S. 71, 75-77, 30 L. Ed. 2d 225, 229-230. Rational relationship departs from the classification here when it attempts to regulate the composition of family to ac-

[4] *McGowan* v. *Maryland* (1961), 366 U.S. 420, 6 L. Ed. 2d 393, involved Sunday closing laws. The statutes were upheld using the test that it must stand if "any state of facts reasonably may be conceived to justify it", cf. 366 U.S. at 425-426, 6 L. Ed. 2d at 399. The fundamental rights involved here were not involved in *McGowan* and different principles apply here.

complish an end served as well or better under another ordinance (see fn. 3, *supra*).

Finally, legislation which comports with equal protection must impose its regulation impartially, *Yick Wo* v. *Hopkins* (1886), 118 U.S. 356, 373-374, 30 L. Ed. 220, 227:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The instant case involves a definition of family so arbitrary and so ill suited to the regulation of population density that the presence of the "unequal hand" is patent. It does "make unjust and illegal discriminations between persons in similar circumstances" with consequences which are material to their rights.

I would declare Ordinance 1341.08(d) unconstitutional in the parts pertinent to this case, reverse the judgment, and discharge the defendant.

JOURNAL ENTRY
THE SUPREME COURT OF OHIO

THE SUPREME COURT OF OHIO
1975 TERM

To wit: November 28, 1975

No. 75-896

THE STATE OF OHIO,)
)
CITY OF COLUMBUS.)

INEZ MOORE, APPELLANT

vs.

CITY OF EAST CLEVELAND, APPELLEE

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ——— day of ——————— 19——
——————————— Clerk
——————————— Deputy

NOTICE OF APPEAL

IN THE SUPREME COURT OF THE
STATE OF OHIO

No. 75-896

INEZ MOORE, APPELLANT

—*vs*—

CITY OF EAST CLEVELAND, OHIO, APPELLEE

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Inez Moore, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of November 28, 1975 affirming the judgment of Conviction, entered herein on May 17, 1974.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257 (2).

/s/ Francis Murtaugh, Jr.
FRANCIS MURTAUGH, JR.
Attorney for Inez Moore, Appellant
Legal Aid Society of Cleveland
3408 Lorain Avenue
Cleveland, Ohio 44113

PROOF OF SERVICE

AFFIDAVIT

I, FRANCIS MURTAUGH, JR., Attorney for Inez Moore, appellant herein, depose and say that on the 20th day of February, 1976, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the City of East Cleveland, Ohio, appellee herein, by mailing a copy in a duly addressed envelope, first class postage prepaid, to its counsel of record, Henry B. Fisher, Director of Law, The City of East Cleveland, 14340 Euclid Avenue, East Cleveland, Ohio 44112.

All parties required to be served have been served.

/s/ Francis Murtaugh, Jr.
FRANCIS MURTAUGH, JR.

Subscribed and Sworn to, before me, at Cleveland, Ohio, this 20th day of February, 1976.

/s/ Francis Murtaugh, Jr.

SUPREME COURT OF THE UNITED STATES

No. 75-6289

INEZ MOORE, APPELLANT

v.

CITY OF EAST CLEVELAND, OHIO

ON CONSIDERATION of the appellant for leave to proceed in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

April 26, 1976

SUPREME COURT OF THE UNITED STATES

No. 75-6289

INEZ MOORE, APPELLANT

v.

CITY OF EAST CLEVELAND, OHIO

APPEAL from the Supreme Court of the State of Ohio.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

April 26, 1976

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 214659 275

Supreme Court, U. S.
FILED
MAR 19 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975

No. 75-6289

INEZ MOORE,
Appellant,

vs.

CITY OF EAST CLEVELAND, OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR APPELLEE IN OPPOSITION

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Supreme Court of the United States

October Term, 1975
No. 75-6289

INEZ MOORE,
Appellant,

vs.

CITY OF EAST CLEVELAND, OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR APPELLEE IN OPPOSITION

OPINIONS BELOW

The Supreme Court of Ohio filed no written opinion with its final judgment dismissing Appellant's appeal. The Ohio Supreme Court held that the case involved no substantial constitutional questions.

The decision of the Court of Appeals of Ohio, Eighth District, on the merits of the case is unreported, but is contained in Appellant's Appendix at pages 3A-11A.

JURISDICTION

The decision and final judgment of the Supreme Court of Ohio was filed on November 28, 1975. The jurisdiction of this court is invoked pursuant to Title 28 U.S.C. § 1257 (2).

QUESTIONS PRESENTED

1. Is there a substantial constitutional question where a legislatively established definition, under a municipal zoning ordinance, states that "a family may consist of one individual", when the said zoning ordinance and its definition have previously been held to be constitutional?

2. Is there a substantial constitutional question where a legislatively established zoning ordinance, which was enacted under the police power of a municipality and in the best interest of the health, safety, morals and welfare of the community, provides that "a family may consist of one individual"?

3. Is there a substantial constitutional question where a legislatively established zoning ordinance, which provides that "a family may consist of one individual", when Appellant fails to present any evidence, at the trial below, in support of her contention that the said zoning ordinance is unreasonable and arbitrary?

4. Does Appellant have proper standing to raise a constitutional question before this Court when said Appellant has failed to exhaust her administrative remedies?

ORDINANCES INVOLVED

ORDINANCES OF THE CITY OF EAST CLEVELAND

1351.02 Limitation on Occupancy

The occupancy of any dwelling unit shall be limited to one, and only one, family and to any authorized persons occupying such dwelling unit with such family.

Section 1341.08, Ordinance 6010, which defines family provides:

1341.08 Family

"Family" means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

(a) husband or wife of the nominal head of the household.

(b) unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

(c) father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

(d) notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

(e) *a family may consist of one individual.*" (Emphasis added).

1311.02 Variances; Rules and Regulations

The Board of Building Code Appeals shall determine all matters properly presented to it and where practical difficulties and unnecessary hardships shall result from the strict compliance with or the enforcement of the provisions of any ordinance for which it is designated as the Board of Appeals, such Board shall have the power to grant variances in harmony with the general intent of such ordinance and to secure the general welfare and substantial justice in the promotion of the public health, comfort, convenience, morals, safety and general welfare of the City. The Board shall also have the power to adopt from time to time such rules and regulations as it may deem necessary to carry into effect the provisions of any ordinance for which it is designated as the Board of Appeals. (Ord. 5636. Passed 6-1-65.)

1311.03 Appeal Procedure

(a) Any person adversely affected by a decision of any City official made in the enforcement of any ordinance for which the Board of Building Code Appeals is designated as the Board of Appeals shall have the right to appeal to the Board of Building Code Appeals from such decision within ten days from the date notice of such decision was given or mailed to him, and to appear before the Board at a time and place fixed by the Board. Such appeal must be in writing. Failure to file a written appeal with the Board within the time prescribed shall constitute a waiver of the right of appeal. The Board shall have the power to approve, amend, modify or reverse any decision of such City official.

(b) Any person adversely affected by a decision of the Board of Building Code Appeals shall also have the right to appeal to the City Commission from such decision within ten days from the date notice of such decision was given or mailed to the appellant, and to appear before the City Commission at a time and place fixed by the City Commission. Such appeal must be in writing. Failure to file a written appeal with the City Commission within the time prescribed shall constitute a waiver of the right of appeal. The City Commission shall have the power to approve, amend, modify or reverse any decision of the Board. (Ord. 5636. Passed 6-1-65.)

STATEMENT OF THE CASE

The facts in the present case, as shown by the transcript of the proceedings in the East Cleveland Municipal Court, Case No. 162307 are as follows: Appellant, Inez Moore is the owner of a two family dwelling structure at 1354-56 Garfield in the City of East Cleveland. Raiford Williams, the City Housing Inspector, came before the Clerk of East Cleveland Municipal Court and swore out a complaint that on or about the 30th day of January, 1974, Inez Moore did unlawfully permit two families to occupy a single family dwelling unit of the structure at 1354-56 Garfield in violation of Section 1351.02 of Ordinance 6010 of the Ordinances of the City of Cleveland.

The Appellant was summoned to appear in the East Cleveland Municipal Court and did so appear. A plea of not guilty was entered and a Motion to Dismiss was subsequently filed, heard and denied. The Appellant was found guilty upon stipulation of defense counsel, that the said Appellant, John Moore, Sr., her son, John Moore, Jr.,

John Moore, Sr.'s son, Dale Moore, her son; and Dale Moore, Jr., the son of Dale Moore, inhabit the single dwelling unit here in question. By stipulating to a plea of guilty to a violation of Section 1351.02, Appellant conceded that the habitation of the dwelling by the above persons was in violation of Section 1351.02, Codified Ordinance 6010 of the Codified Ordinances of the City of East Cleveland.

There is no evidence in the record below that Appellant made an administrative appeal of the citation as provided for in Chapter 1311 of the Codified Ordinances of East Cleveland.

REASONS FOR DENYING APPELLANT'S APPEAL

1. There is no substantial constitutional question, where a legislatively established definition, under a municipal zoning ordinance states that "a family may consist of one individual," when the said ordinance and its definition have previously been held to be constitutional.

The case of *Belle Terre v. Boraas*, ... U.S. ....., 94 S. Ct. 1536 (1974) involved a zoning ordinance of the Village of Belle Terre which defined the word "family". The definition in essence restricted a family to blood relatives and not more than two unrelated people living together. Six unrelated college students were living together in a house in a single family dwelling district. The owner of the house, Boraas, who was cited for a violation, contested the constitutional validity of the ordinance. Boraas raised numerous objections including the right to privacy and the right to travel. Justice Douglas, who is known as one of the staunch supporters of the absolutist theory concerning First Amendment rights, in writing the opinion of this

Court summarily dispensed with Boraas's arguments. To paraphrase Justice Douglas' statements at page 1540 of 94 S. Ct., there was no procedural disparity occasioned on some but not on others; the ordinance did not involve any fundamental right guaranteed by the Constitution including right to privacy and right of association. As Justice Douglas further stated:

> "We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable not arbitrary' (quoting *F. S. Royster Guano Co. v. Virginia*, 253 U. S. 412, 415, 40 S. Ct. 560, 561, 64 L. Ed. 989 and bears a rational relationship to a (permissible) state objective. *Reed v. Reed*, 404 U.S. 71, 76, 92 S. Ct. 251, 254, 30 L. Ed. 2d 225."

As to the contention of Appellee Boraas that if two unrelated people could constitute a family within the meaning of the ordinance, three or four should be also included, Justice Douglas stated that every line drawn by a legislature leaves some people out who might have been included; that it is an exercise of discretion left to the legislature not the judiciary. *Belle Terre v. Boraas*, ... U.S. ....., 94 S. Ct. 1536, 1540 (1974).

Although the *Belle Terre* case dealt with unrelated persons, it is analogous to the present case since the question in both is the constitutional validity of an ordinance defining family. In both cases the legislative authority of the municipality has sought to promote the public welfare limiting the people who can dwell in a single family unit by defining the word family. Although Section 1341.08 of the ordinances of East Cleveland might seem more restrictive than the *Belle Terre* ordinance, it does

not limit the traditional family composed of the parents and unmarried children, but even goes beyond that standard. Thus the rationale of the *Belle Terre* case that there is no violation of fundamental rights, that the "rational relationship" test should be applied, and that there is no disparity created by the line drawn by the legislature which will not be interfered with by the judiciary, should also be applicable to this case.

The case of *Palo Alto Tenants Union v. Morgan,* 321 F. Supp. 908 (Fed. Dist. Ct. N.D. Calif. 1970), *affirmed* 487 F.2d 883 (1973) involved the constitutionality of an ordinance defining family as persons related by blood, marriage or legal adoption, or not more than four unrelated persons.

Although that case centered on the provision for four unrelated persons, it is analogous to the present situation in that the constitutionality of a restrictive definition of family by a zoning enactment is involved.

The plaintiff tenants in the *Palo Alto* case asserted the arguments of freedom of association and right to family privacy, claiming them to be fundamental rights under the constitution, and therefore only to be infringed upon by a showing of compelling state interest, 321 F. Supp. 908 at 910. The Court rejected the tenants' arguments and held,

> ". . . the ordinance rational within the meaning of the equal protection and due process clauses of the 14th Amendment." Id. at 912.

In discussing validity of zoning classification the court related that such,

> ". . . classifications have generally been upheld if any state of facts can be conceived which would render

> the legislative decision reasonable. *Dandridge v. Williams,* 397 U.S. 471, 90 S. Ct. 1253, 25 L. Ed. 2d 491 (1970)." *Id.* at 911.

It is true as asserted by Appellant that the Court in the *Palo Alto* case suggested that a law which barred traditional families from single family dwelling districts might be suspect, *Id.* 911. However, this is merely dicta and the court in this passage did not define "traditional family". Further, at page 912 of its opinion, the court stated that the average size of the traditional family is *less than* four people.

In summary, the *Palo Alto* and *Belle Terre* cases are analogous to the present case, since all three deal with the constitutionality of ordinances defining "family" for zoning purposes. The rejection of the free association, right of privacy and family privacy, fundamental interest, and the disparity in classification should also be applicable in the present case.

In the case of *City of East Cleveland v. Seaborn Hilson,* East Cleveland Municipal Court, Case No. 101,060, the defendant Hilson was found guilty of violating Section 1351.02, Ordinance 6010, as interpreted by Section 1341.08, Ordinance 6010, of the City of East Cleveland. The defendant appealed on the grounds that Section 1341.08 was unconstitutional due to vagueness and violation of the due process clause of the Fourteenth Amendment, as well as on the grounds that the judgment was not supported by the weight of the evidence. Although the Court of Appeals, Eighth District, Cuyahoga County, reversed, holding that the judgment was not supported by the weight of the evidence, the Court also held that Section 1341.08 was *not* unconstitutionally vague, and was not in violation of the Fourteenth Amendment. *Hilson v. City of East Cleve-*

land, Case No. 30544 (App. 1971). See Journal Entry in Book 40, pages 609, 610, journalized October 12, 1971, and corrected Journal Entry, Book 41, page 345, journalized October 17, 1971.

Even though there was no opinion written by the Court of Appeals in the *Hilson* case, the upholding of the constitutionality of Section 1341.08 in that case should be determinative in the present case. The applicability of the *Hilson* ruling to the present case should not be diminished by the fact that the Appellant here is relying more heavily upon an equal protection argument than due process of law. The test for the validity of a zoning enactment should still be the same—whether or not the ordinance is reasonable, not arbitrary, and related to the public health, safety and welfare. This is surely the test used by the Court of Appeals in the *Hilson* case in upholding the constitutional validity of Section 1341.08 of Codified Ordinances of the City of East Cleveland.

Section 1341.08 does not attempt to restrict the traditional family of parents and their minor children; rather it goes further than this allowing other blood relatives. To allow a municipality to enact and enforce an ordinance such as Section 1351.02 for single family dwelling zoning, which section appellant does not contest, and then to deny the municipality the right to enforce such ordinance by defining the word family as used in Section 1341.08, would be denying the effectiveness of single family dwelling zoning.

2. There is no substantial constitutional question, where a legislatively established zoning ordinance, which was enacted under the police power of a municipality, and in the best interests of the health, safety, morals and welfare of the community, provides that "a family may consist of one individual".

The rationale for Sections 1351.02 and 1341.08 of Codified Ordinance 6010 is readily apparent from the Charter of the City of East Cleveland and Section 1343.02, Ordinance 6010. Section 1 of the Charter of East Cleveland provides in part:

> "The inhabitants of the City of East Cleveland as its limits now are or may hereafter be, shall be a body politic incorporate by name of the City of East Cleveland, and as such shall have perpetual succession; . . . may define, prohibit, abate, suppress, and prevent all things detrimental to the health, morals, comfort, safety and convenience and welfare of the inhabitants of the City and all nuisances and carrier thereof; *may regulate* the construction, height, and the material used in all *buildings* and the maintenance and *occupancy* thereof; . . . and may pass such *ordinances* as *may be expedient for maintaining and promoting* the peace, good government and *welfare of the City*, and for the performance of the functions thereof . . ." (Emphasis added)

Section 1343.02, Ordinance 6010, of the City of East Cleveland sets the purpose of the Housing Code which includes Sections 1351.02 and 1341.08:

> "1343.02 PURPOSE.
>
> Within the scope of this Housing Code as hereinafter defined, the purpose of this Housing Code is: to establish minimum standards necessary to make all dwell-

ing structures safe, sanitary, free from fire and health hazards, and fit for human habitation and beneficial to the public welfare; to establish minimum standards governing the maintenance of dwelling structures in such condition as will not constitute a blighting or deteriorating influence on the neighborhood and the community; to protect property values and to maintain the character and appearance of the community and neighborhoods within the community; to fix responsibilities for owners and occupants of dwelling structures with respect to sanitation, repair and maintenance; . . . ."

It is clearly apparent from the above quoted provisions of the Charter of East Cleveland and Section 1343.02, that the enactment and enforcement of Sections 1351.02 and 1341.08 are in the best interests of the community, to further the health, safety and welfare of the citizens of East Cleveland.

In addition, the limiting of the number of families in a single dwelling unit helps alleviate the congested parking and traffic problem in East Cleveland; more families generally mean more automobiles. Further, the burden on the school system of East Cleveland is apparent; if more than one family is allowed to live in a single family dwelling unit, the Board of Education will be burdened with a disproportionate number of students as compared to the revenue from real estate taxes generated to provide funds for the school system. Moreover, responsibility as to ownership is fixed for enforcement purposes.

It should also be noted that in the case of *Nolden v. East Cleveland City Commission*, 12 Ohio Misc. 205, 232 N.E.2d 421 (App. 1966) the Court of Common Pleas of Cuyahoga County upheld Section 1351.03, Ordinance 6010, entitled Habitable Floor Area.

As noted by the Court of Common Pleas in the *Nolden* case at page 210 of 12 Ohio Misc.:

"There is no question but that the purposes of the housing code: fire safety, sanitation, health, crime prevention, maintenance of property, neighborhood, and community are mothers of public welfare, and are today well within the scope of the police power. In the recent case of *Reid v. Cleveland Heights*, 119 Ohio App. 67 (1963), the Cuyahoga County Court of Appeals held that the desire to maintain a 'high character of community development' is in the public interest and contributes to the general welfare."

It is obvious that the rationale of the above statement applies equally to Section 1341.08 since both 1341.08 and 1351.03 are directed to the same purpose as stated in Section 1343.02 and the Charter of East Cleveland.

Even though persons residing in a single family dwelling may not violate the person per square feet requirement of 1351.03, a situation such as the present one could arise where more than one family is inhabiting a single family dwelling. Therefore, Section 1341.08 is needed to prevent such multiple family habitation in a single family dwelling, to prevent overcrowding, traffic and parking congestion, an undue burden on East Cleveland's school system; the diminution of the property value and character of the neighborhood; and to fix responsibilities for enforcement purposes; all of which are proper exercises of the police power for the public welfare of the community.

Finally, a single family dwelling zoning which has been long recognized as constitutional, would be meaningless if the municipality could not effectively enforce it by measures such as Section 1341.08, Ordinance 6010, of the City of East Cleveland.

3. There is no substantial constitutional question, where a legislatively established zoning ordinance which provides that "a family may consist of one individual", when the Appellant fails to present any evidence, at the trial below, in support of her contention that the said ordinance is unreasonable and arbitrary.

The courts have consistently held that the strong presumption of validity applicable to legislative acts in general also applies to zoning ordinances. *State ex rel. River Grove Park Inc. v. City of Kettering, et al.*, 118 Ohio App. 143, 149, 193 N.E.2d 547 (App. Montgomery County, 1962), citing *Curtiss v. City of Cleveland*, 170 Ohio St. 127 (1959). Also see *Cleveland Trust Co. v. Village of Brooklyn*, 92 Ohio App. 351, 359, 110 N.E.2d 440 (App. Cuyahoga County, 1952).

The test of whether a zoning regulation is valid and constitutional is whether it is reasonable and not arbitrary, and has a substantial relation to the public health, safety and welfare. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S. Ct. 114 (1926). Also see *Nectaw v. City of Cambridge*, 277 U.S. 183, 48 S. Ct. 447 (1928). As stated by the Court of Appeals for Cuyahoga County in the case of *Pure Oil Division v. Brook Park*, 26 Ohio App. 2d 153, 154-155, 269 N.E.2d 853 (1971):

> "The underlying principle in determining the validity of all zoning enactments is whether or not that ordinance passed under the state's police power is related to the safety, health, and welfare of the community." See *Euclid v. Amber Realty Co.* (1926), 272 U.S. 365.

The courts have not been restrictive in determining what is proper for public welfare in the contest of zoning enactments. Justice Douglas, in writing the majority opinion for the United States Supreme Court in the case of

Belle Terre v. Boraas, ... U.S. ....., 94 S. Ct. 1536, 1539 (1974) citing the case of *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, stated that the court in that case refused to limit the concept of public welfare which can be enhanced by zoning regulations:

> "The concept of public welfare is broad and inclusive . . . The values it represents are spiritual as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled."

(Quoting from the *Berman* case at pp. 32-33 of 348 U.S.). The same principle has been recognized in the Common Pleas Court of Cuyahoga County in the case of *Nolden v. East Cleveland City Commission*, 12 Ohio Misc. 205, 210, 232 N.E.2d 421 (App. 1966). By reason of the above authorities it is clearly apparent that what is for the public welfare has been broadly interpreted by the courts in determining the validity of zoning enactments.

Even if the validity of the classification by the legislature for the purpose of zoning is fairly debatable, the judgment of the legislature will prevail. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S. Ct. 114 (1926). Also see *Cleveland Trust Co. v. Village of Brooklyn*, 92 Ohio App. 351.

It is also well established that a court will not substitute its judgment as to the wisdom of a zoning enactment for that of the legislature. *Cleveland Trust Co. v. Village of Brooklyn*, 92 Ohio App. 351, 359, 110 N.E.2d 440 (1952), *Pritz v. Messer*, 112 Ohio St. 628, 638-639, 149 N.E. 30 (1925).

The burden of proving that a zoning enactment is unreasonable and arbitrary, and therefore invalid, is upon

the party challenging it. *Pearce v. Youngstown*, 100 Ohio App. 22, 25, 135 N.E.2d 430 (1954). The evidence that a zoning regulation is unreasonable must be clear and satisfactory. *Peebles v. State*, 25 Ohio L. Abs. 545, 546 (App. 1937), *dismissed for want of debate* q. 133 Ohio St. 130 (1937).

The Court of Appeals of Ohio, Eighth District, in affirming the decision of the trial court in the instant case, noted that the Constitution of the State of Ohio, Section 3, Article XVIII states:

> "municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Further the Court of Appeals, in the instant case held that:

> "Two reasons for enacting and enforcing Sec. 1341.08 are mentioned by counsel for East Cleveland in his brief: 1) to help alleviate traffic congestion, and 2) to lessen the possible financial burden on the city school system which would result from an inordinate number of school age children residing in a single dwelling which would consequently generate a disproportionately small real estate tax revenue per child.
>
> The defendant failed to present the trial court with any evidence to support her contention that Sec. 1341.08 is violative of the equal protection and due process clauses. Rather she rests on the assertion in her appellate brief, that the ordinance is unreasonable and arbitrary on its face. We disagree.

A municipal ordinance enacted pursuant to the legislative exercise of local police power is valid unless it clearly bears no real and substantial relation to public health, safety, morals or general welfare. *Benjamin v. City of Columbus* (1957), 167 Ohio St. 103; *Curtiss v. Cleveland* (1959), 170 Ohio St. 127.

As this court recently stated in syllabus 3 of *Alsenas v. City of Brecksville* (1972), 29 Ohio App. 2d 255:

> 'To prevail in such a case the complainant must also clearly establish that the ordinances he attacks do not bear a real and substantial relation to the public health, safety, morals or general welfare and are, in turn, unreasonable or arbitrary, that is, in substance, that the local legislative authority could not have reasonably believed or, in permitting such legislation to remain in force, cannot reasonably believe that the necessity of regulation in the public interest outweighs, qualitatively, the impact imposed on the individual property owner.'
>
> A duly enacted municipal ordinance is presumed to be constitutionally valid. The burden of establishing the unconstitutionality of such ordinance is upon the one challenging its validity. *Cleveland v. Antonio* (1955), 100 Ohio App. 334.
>
> Since the defendant presents no evidence to rebut the presumption of legislative validity, we find that Sec. 1341.08 bears a real and substantial relation to public health, safety or welfare and is, therefore valid. See *City of East Cleveland v. Palmer* (1974), 40 Ohio App. 2d 10."

In summary, zoning enactments are presumed to be valid and appellant has failed to prove that Section 1351.02 as interpreted by Section 1341.08, is unreasonable, arbitrary or not related to the public health, safety and welfare. The wisdom of the legislature in providing for the health, safety and welfare of the community should not be usurped by the judgment of a Court. Finally, what is within the public welfare for zoning purposes has been widely interpreted by the Courts, and in the present case clearly includes Section 1341.08 of the Ordinances of the City of East Cleveland.

4. Appellant has no standing to raise a constitutional question when the said appellant fails to exhaust timely her administrative remedies established by the enabling legislation.

The Codified Ordinances of the City of East Cleveland provides, in Chapter 1311, for appeals. Section 1311.03 of the Codified Ordinances provides the following:

1311.03 APPEAL PROCEDURE.

(a) Any person adversely affected by a decision of any City official made in the enforcement of any ordinance for which the Board of Building Code Appeals is designated as the Board of Appeals shall have the right to appeal to the Board of Building Code Appeals from such decision within ten days from the date notice of such decision was given or mailed to him, and to appear before the Board at a time and place fixed by the Board. Such appeal must be in writing. Failure to file a written appeal with the Board within the time prescribed shall constitute a waiver of the right of appeal. The Board shall have the power to approve, amend, modify or reverse any decision of such City official.

(b) Any person adversely affected by a decision of the Board of Building Code Appeals shall also have the right to appeal to the City Commission from such decision within ten days from the date notice of such decision was given or mailed to the appellant, and to appear before the City Commission at a time and place fixed by the City Commission. Such appeal must be in writing. Failure to file a written appeal with the City Commission within the time prescribed shall constitute a waiver of the right of appeal. The City Commission shall have the power to approve, amend, modify or reverse any decision of the Board. (Ord. 5636. Passed 6-1-65.)

It is clear from the record below that Appellant neither appealed the housing inspector's citation to the Board of Zoning Appeal nor did she lodge an appeal with the City Commission. Where the legislature has established a procedure for appealing adverse decisions, that administrative procedure must be exhausted before one can seek a court remedy. Thus, Appellant's failure to exhaust her administrative remedy, by failing to file a timely appeal, precludes this appeal because she lacks standing to make it.

SUMMARY

Even if the court decided that the ordinance in question presented a matter upon which the court might wish to rule, the instant case is not the type of case which should be given the consideration of this Court. Nowhere in the record is there any evidence by the Appellant to show that the ordinance is unreasonable or arbitrary.

The Appellant lacks standing before this court. The Appellee has shown a substantial relation to public health, safety, morals and general welfare.

Further Appellant has provided no evidence to rebut the presumption of the constitutionality of the ordinance.

The Supreme Court of Ohio found no substantial constitutional question.

The instant case involves an attempt to raise a constitutional issue which has been settled by the United States Supreme Court. We submit to this court that the facts in the within case do not justify a hearing of this case on the merits, and we respectfully request that the court deny the appeal.

CONCLUSION

For all the foregoing reasons, Appellee respectfully requests that the appeal be denied.

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Supreme Court, U. S.
FILED
JUL 3 1976
MICHAEL RODAK, JR., CLERK

CORRECTED COPY
FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-6289

INEZ MOORE,

Appellant,

v.

CITY OF EAST CLEVELAND, OHIO,

Appellee.

ON APPEAL FROM A JUDGMENT OF
THE SUPREME COURT OF OHIO

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IN THE

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INEZ MOORE,

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CITY OF EAST CLEVELAND, OHIO,

Appellee.

ON APPEAL FROM A JUDGMENT OF
THE SUPREME COURT OF OHIO

BRIEF FOR THE APPELLANT

OPINIONS BELOW

Following an appeal from the East Cleveland Municipal Court, the Court of Appeals of Ohio, Eighth Judicial District affirmed the judgment of the Municipal Court in a written opinion. That opinion is unreported but is reproduced in the Appendix (A-7).

The Supreme Court of Ohio dismissed the Appellant's appeal to that court, holding that no substantial constitutional question was presented. The judgment of the Supreme Court was not accompanied by an opinion.

JURISDICTION

The decision and final judgment of the Supreme Court of Ohio was filed on November 28, 1975. Notice of appeal was filed in the Supreme Court of Ohio on February 20, 1976. This case was docketed on February 26, 1976. Leave to appeal in forma pauperis was granted and probable jurisdiction was noted on April 26, 1976. The jurisdiction of this Court is conferred by 28 U.S.C. §1257(2).

ORDINANCES INVOLVED

The relevant East Cleveland Municipal ordinances are as follows:

"1341.08 FAMILY.

'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

(a) husband or wife of the nominal head of the household.

(b) unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

(c) father or mother of the nominal head of the household or of the spouse of the nominal head of the household.

(d) notwithstanding the provisions of subsections (b) hereof, a family may include not more than one dependent married or unmarried child of

the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

(e) a family may consist of one individual."

"1351.02 LIMITATION ON OCCUPANCY.

The occupancy of any dwelling unit shall be limited to one, and only one, family and to any authorized persons occupying such dwelling unit with such family."

"1351.03 HABITABLE FLOOR AREA.

Every dwelling unit shall conform to the following standards:

* * *

(b) Every dwelling unit shall have not less than 250 square feet of habitable floor area and shall contain at least one room which shall have not less than 150 square feet of habitable floor area and which is not less than ten feet in width; provided further that no room used to compute compliance with such 250 square foot minimum limitation shall be less than seventy square feet of habitable floor area.

* * *

(e) Every dwelling unit shall contain at least 150 square feet of habitable floor area for the first occupant thereof and at least 100 additional square feet of habitable floor area for every additional occupant thereof, but in no case shall any dwelling unit contain less than 250 square feet of habitable floor area."

* * *

QUESTION PRESENTED

Whether the City of East Cleveland may, through its zoning ordinances, constitutionally define "family" so narrowly as to preclude many blood relatives from living together as a single family unit, even to the extent of precluding a grandmother from living with and raising her grandson.

STATEMENT OF THE CASE

The Appellant Inez Moore is a homeowner in the municipality of East Cleveland, Ohio. She is the paternal grandmother of John Moore, Jr., presently age 10, and has raised her grandson in her own home since the death of the child's mother in 1967, when John Jr. was less than a year old. Also present in the home is John Jr.'s father, John Moore, Sr. and Mrs. Moore's other son Dale Moore and Dale's son, Dale Jr. (A-5).

Sometime after John Jr. enrolled in the East Cleveland Public Schools, Mrs. Moore's home was inspected by an East Cleveland Municipal Housing Inspector. On January 16, 1973 a notice was issued by Deputy Housing Inspector Raiford Williams informing Mrs. Moore that she was in violation of East Cleveland Ordinance §1351.02 which states that the occupancy of a dwelling unit shall be limited to one, and only one family. The notice specified that "John Moore, Jr. (7) is an illegal occupant of suite 1854." (A-8)

This allegation was occasioned by the definition of "family" in §1341.08 of the East Cleveland zoning ordinances. That section strictly regulates the kinds of family members that may live together. The ordinance

designates one person as "nominal head of the household", normally the homeowner. The husband or wife of the homeowner and their unmarried children may occupy a home under this ordinance. However, only one of the homeowner's parents may live in the house; brothers and sisters, nieces and nephews, and uncles and aunts of the homeowner are not defined as part of the family and may not live in the home. In addition, the homeowner may allow not more than one of his/her children to bring grandchildren into the home. It was this aspect of the ordinance which Mrs. Moore offended when she allowed her grandson John Jr. to live in her home when another grandchild by a second son was also living there.

On April 3, 1974 Mrs. Moore was charged criminally with "unlawfully permit[ting] two families to occupy a single family dwelling unit." (A-2) Certain stipulations of fact were received by the trial court confirming the composition of the Moore family and the defendant filed a motion to dismiss on the ground that the ordinance was unconstitutional. (A-3) This motion was overruled on May 17, 1974 and the defendant was found guilty. The trial court fined Mrs. Moore $25.00 and sentenced her to five days in jail for her crime. (A-1)

An appeal was perfected to the Court of Appeals of Ohio for the Eighth Judicial District. That court affirmed the judgment of the trial court in an opinion issued on July 18, 1975 (A-7); Presiding Judge Jack G. Day filed a dissenting opinion. (A-14) The Defendant-Appellant filed an appeal in the Ohio Supreme Court; that Court dismissed the appeal without opinion for want of a substantial constitutional question. (A-19)

A notice of appeal was filed from the judgment of the Ohio Supreme Court (A-20) and on April 20, 1976 this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

The family has long been afforded protection in the law, not only at the insistence of state legislatures and the state judiciary, but also in an unbroken line of United States Supreme Court decisions. The elevated status of the family is based upon the fundamental rights of privacy and freedom of association as enunciated in the decisions of this Court, and more particularly includes the right of a parent to control the upbringing of his children and the right of family members to establish a home together in a manner best suited to their individual and collective needs. The law too recognizes that the family has always been a flexible institution in our society, an institution which frequently incorporates grandchildren, elderly aunts, nieces and nephews; the decisions have not drawn a circle around the principles of privacy and freedom of association so tightly as to "zone out" the family that departs from the husband-wife-child pattern.

This East Cleveland ordinance directly and substantially interferes with these fundamental rights in that it tells a grandmother that she cannot raise her grandson in her own home and it tells a father that he cannot decide that his child's best interests require him to maintain the maternal relationship between his son and the child's grandmother. This same ordinance ventures even further to tell many common groupings of blood relatives (for example the married woman who

returns to live with her parents while her husband serves in the armed forces) that they cannot make that very personal and private decision to live together as one household in East Cleveland, Ohio.

A criminally enforceable ordinance which slices so deeply into family relationships and which banishes from a community many true families, is overbroad and there exists no compelling governmental interest to support it. Similarly, in equal protection terms, an ordinance which prevents ten year old grandsons from living with their grandmothers is subject to the most rigorous judicial scrutiny. The justifications tendered by the City for the ordinance, such as density control, traffic control and ease of enforcement, are not of that quality of interests which this court has previously denoted as compelling and are in fact substantially less important than such interests. Moreover, there are many other, less offensive, methods by which East Cleveland can accomplish its objectives; indeed one of its objectives, the control of population density, has already been met in a variety of ways including the adoption of an ordinance placing a per person occupancy limit on each dwelling unit in the city.

Even if the presence of protected family interests does not require a stricter standard of review, the more relaxed standard of review dictated by this Court in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) is more than this classification can withstand. Taking each purported justification individually, those interests which can be considered "legitimate" are hardly furthered by this ordinance. Thus the control of population density is merely duplicative of other ordinance sections and the control of automobile traffic is scarcely furthered by relocating young children

outside the city limits. Each justification fails under analysis and the entire classification fails to meet the fair and substantial relation standard of *Village of Belle Terre.*

ARGUMENT

I.

INTRODUCTION.

The East Cleveland ordinance at issue in this case is at war with traditional concepts of the family, arbitrarily classifying a single family as "two" and criminally punishing the head of the household for permitting such a family relationship to endure. The definition of the family as adopted by the City of East Cleveland excludes from its dwelling units many common family groupings such as (1) the adult brother and sister, as yet unmarried, who choose to reside together; (2) the married woman who rejoins her parents while her husband is in the armed forces; (3) a married couple who take in and raise an orphaned niece or nephew; (4) the grandmother who raises the children of her deceased daughter; (5) the married couple and their children who provide a familial sanctuary for their immigrant uncle; (6) two elderly sisters whose spouses have passed away.

A. The Family As a Social Institution.

The family is the most deeply rooted of all society's institutions. "The Human family constitutes the beginning and the essential element of society." St.

Augustine, *The City of God,* Book XIX, Chapter XVI. It is an institution that predates, and very likely will antedate, other legal and social institutions, such as the municipality, which we have come to accept.

> As far back as our knowledge takes us, human beings have lived in families. We know of no period when this was not so. We know of no people who have succeeded for long in dissolving the family or displacing it. Instead, men have exercised their imagination in the elaboration of different styles of family living and different ways of relating to the larger community. Mead & Heyman, *The Family* (1965).

Sociologists commonly define families as persons related by name, age or ancestry, who live in the same household;[1] families are then further classified as "nuclear" or "extended." The nuclear family is confined to husband, wife and children, with no other members present. The extended family includes other relatives or in-laws of the family head, sharing the same household living arrangements with the nuclear members.[2] The balance between the extended family and the nuclear family has shifted over time and the extended family is not as common today as it was in the nineteenth century. While today the nuclear family is evidently the "prevailing" pattern among middle class Americans,[3] the extended family remains a vital part of present day living patterns and plays a special role among certain subcultures within our population.

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[1] Billingsley, *Black Families in White America,* p. 16 (1968).

[2] *Id.*

[3] Zanden, *Sociology: A Systematic Approach,* p. 320 (1965).

The extended family has many strengths which are not present in the nuclear family. Dorothy B. Blitstein writes:

> The case histories behind mounting rates of delinquency, addiction, crime, neurotic disabilities, mental illness and senility in societies in which autonomous nuclear families prevail suggest that frequent failure to develop enduring family ties is a serious inadequacy for both individuals and societies." Blitstein, *The World of the Family*, 256 (1963).

Extended families provide services and emotional support seldom found in the nuclear family:

> the troubles of the nuclear family in industrial societies generally, and in American society, particularly, stem largely from the inability of this type of family structure to provide certain of the services performed in the past by the extended family. Adequate health, education, and welfare provision, particularly for the two non-productive generations in modern societies, the young and the old, is increasingly an insurmountable problem for the nuclear family. The unrelieved and sometimes unbearably intense parent-child relationship, where child-bearing is not shared at least in part by others, and the loneliness of nuclear family units, increasingly turned in on themselves in contracted and relatively isolated settings, is another major problem.[4]

In times of crisis, the American family has traditionally reorganized itself into a more extended family pattern to accommodate the needs of its members. An English visitor to the United States wrote in 1848:

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[4] Yorburg, *The Changing Family*, p. 194 (1973).

> Our blessed custom they have in America resulting from the abundance which they enjoy; a man dies, his widow and children are objects of peculiar care to the surviving branches of his family; the mother dies, her orphans find a home among her friends and relatives.[5]

This practice of expanding the home to assist relatives has continued to be an accepted tenet of our society.[6] Among all segments of modern American society, and especially within families which lean toward traditional religious values, kinship ties are relied on to provide a home for emotionally needy or otherwise needy relatives.[7]

The extended family is of particular importance to elderly persons. It is recognized that the elderly need to maintain strong family ties to effectively cope with life as they grow older.[8] A sample obtained by the United

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[5] Calhoun, *A Social History of the American Family*, p. 23 (1945).

[6] Kosa, Rachiele and Schommer, *Sharing the Home With Relatives*, Marriage and Family Living, p. 129 (May, 1960).

[7] *Id.*

[8] Report of the White House Conference on Aging, pp. 225, 227, (1961). According to Dr. Charles Palm, regional commissioner for mental health and medical programs in Pennsylvania, "besides poverty, the major psychological problems of being old are that many times you're lonely, you don't have many friends left and you don't have anything to do. . . . When an older person is around his family and loved ones, senility takes longer to occur, because the elderly person is forced to use his mind more. Also, grandchildren and grandparents can be a great source of mutual emotional security." Anderson, *The Pains and Pleasures of Old Black Folks*, Ebony, pp. 128-130. (March, 1973).

States Census Bureau in 1952 revealed that among elderly people (65 years and older) one fourth of the married couples, almost one-third of the widowed, single, divorced and separated males, and almost half of the widowed, single, divorced and separated females lived with their children.[9] With the rapid increase in the percentage of elderly persons in our society, the prevalence of the extended family can be expected to increase.[10]

Among subgroups within our society, the extended family is more common among the very affluent and the very poor.[11] Black families and white ethnic families frequently tend to be extended families.[12]

> Within the black lower-class it has been quite common for several generations, or parts of the kin, to live together under one roof. Often a maternal grandmother is the acknowledged head of this type of household which has given rise to the term "matrifocal" to describe lower-class black family patterns. Scanzoni, *The Black Family in Modern Society*, p. 134 (1971).

There is a much greater tendency for black families than white families to take in young related children. In husband-wife families without children, only 3% of white families compared to 13% of black families take

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[9]Donahue and Tibbits (ed.), *The New Frontiers of Aging*, pp. 161-62 (1957). See also Caven, *Family Life and Family Substitutes in Old Age*, American Sociological Review, pp. 71-83 (February, 1949).

[10]See Atchley, *The Social Forces in Later Life*, p. 9 (1972).

[11]Yorburg, *The Changing Family*, p. 108 (1973).

[12]Novak, *The Rise of the Unmeltable Ethnics*, p. 300 (1973).

in relations under age 18. In families headed by a woman, black families demonstrate an even greater tendency to absorb other related children (41% as compared with 7% in similarly situated white families). Families headed by elderly black women take in the highest proportion of related children, a figure of 48%.[13] The role of the grandmother in the black family is obviously of extreme significance. In discussing the black family, Joyce Ladner states:

> Grandmothers often live in the homes of their children and grandchildren. Here they probably exercise more influence over the behavior of the child than do the parents because of their continuous involvement with them. They not only take care of them in the absence of the parents but the process continues even when the parents return home.[14]

B. The Family in the Law.

The institution of the family has historically been accorded considerable protection in the law, reflecting its primary role in society. This protection can be seen in judicial efforts to guard families against undue state interference in their internal functioning, as well as in the deference the courts have given to legislative attempts to support the institution of the family.

This Court has long deemed the rights to establish a home, to control the upbringing of children and to family life in general to be of fundamental importance

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[13]Hill, *Strengths of the Black Family*, p. 5 (1971).

[14]Ladner, *Tomorrow's Tomorrow*, p. 61 (1972).

in our constitutional scheme, despite the absence of express language in the Bill of Rights. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). See also *Prince v. Massachusetts*, 321 U.S. 158 (1944). In addition this Court has also consistently acknowledged the propriety of state legislation to protect the family, particularly the marriage relationship. *See, Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1877); *Simms v. Simms*, 175 U.S. 162, 167 (1899); *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Sosna v. Iowa*, 419 U.S. 393 (1975). See also *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

Legislative concepts of family have often incorporated an understanding of the role in which the broader family (the non-nuclear or extended family) plays in American life. Congress has recognized this reality in the Social Security Act[15] and in the Internal

[15]42 U.S.C. §601

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part.

* * *

42 U.S.C. §606

When used in this part –

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or

(continued)

Revenue Code.[16] State laws of descent and distribution

(footnote continued from preceding page)

physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, ...

[16]26 U.S.C. §152

(a) General definition. For purposes of this subtitle, the term "dependent" means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer (or is treated under subsection (c) or (e) as received from the taxpayer):

(1) A son or daughter of the taxpayer, or a descendant of either,
(2) A stepson or stepdaughter of the taxpayer,
(3) A brother, sister, stepbrother, or stepsister of the taxpayer,
(4) The father or mother of the taxpayer, or an ancestor of either,
(5) A stepfather or stepmother of the taxpayer,
(6) A son or daughter or a brother or sister of the taxpayer,
(7) A brother or sister of the father or mother of the taxpayer,
(8) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of the taxpayer,
(9) An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 153, of the taxpayer) who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household, or
(10) An individual who –
  (A) is a descendent of a brother or sister of the father or mother of the taxpayer,
  (B) for the taxable year of the taxpayer receives institutional care required by reason of a physical or mental disability, and
  (C) before receiving such institutional care, was a member of the same household as the taxpayer.

reflect, in part, this same understanding.[17] The judiciary too has consistently deferred to natural blood relationships in the contexts of child custody and guardianship proceedings.[18]

[17]See, for example, Ohio Revised Code §2105.06.

Several states have enacted relative responsibility laws which impose legal obligations of support on certain relatives (e.g., in some states an individual may be obligated to support his parents, grandparents, brothers and sisters). See Farber, *Family and Kinship in Modern Society*, p. 69 (1973).

[18]In custody hearings, where the parents are not eligible for consideration, the courts have generally favored lineal ascendants or other blood relatives. *Tillman v. Walter*, 21 Ala. App. 241, 108 So. 61, *cert. denied* 214 Ala. 76, 108 So. 67 (1925); *In Re Hauser*, 189 N.Y.S. 51 (Sur. Ct. 1921); *In Re Zimdal*, 190 App. Div. 54, 179 N.Y.S. 380 (1919); *Commonwealth ex rel. Bradley v. Bradley*, 188 Pa. Super 108, 146 A.2d 147 (1958); *Commonwealth ex rel. v. Perna*, 74 Pa. D. & C. 1 (C.P. Berks Co. 1950); *Parker v. Lewis*, 45 Okla. 807, 147 P. 310 (1915). Frequently courts give priority to the grandparents in custody contests thereby preserving the family unity. *Zook v. Spannaus*, 34 Ill. 2d 612, 217 N.E. 2d 789 (1966); *McLain v. Short*, 144 Ark. 600, 244 S.W. 428 (1920); *Shope v. Singleton*, 196 Ga. 506, 27 S.E. 2d 26 (1943). In Ohio see *In Re Haynes*, 62 Ohio App. 289, 23 N.E. 2d 956 (1939), awarding custody of a neglected child to a maternal aunt.

Similarly, close blood relatives are typically entitled to a preference in appointment as guardians for minors. See, e.g., *McLain v. Short, supra; Simmons v. Simmons*, 185 Ky. 449, 215 S.W. 86 (1919); *State ex rel. Michelson v. Superior Court of King County*, 41 Wash. 2d 718, 251 P. 2d 603 (1952). As to disputes among relatives, see 63 A.L.R. 3d 813. Such a preference (sometimes statutory, sometimes judicial) also exists for the appointment of close relatives as guardians for incompetent persons. 65 A.L.R. 3d 991.

As one might expect, the word "family" in the law is sometimes interpreted differently, depending on the context within which it is used.[19] Nevertheless the state courts have demonstrated a district pattern of defining the term "family," when possible, in an extended family sense so as to accommodate and protect the family configuration presented to them.[20] The law of zoning is no exception to this generalization. Zoning ordinances have traditionally either left the term "family" to definition by the Court (in which case it has uniformly been defined to include all blood

[19]See generally, *Norwegian Old Peoples' Home Society v. Wilson*, 176 Ill. 94, 52 N.E. 41, 43 (1898); *Spencer v. Spencer*, 11 Paige 159, 160 (N.Y. 1844); *Whelan v. Reilly*, 3 W. Va. 597, 610 (1869). In the context of wills, of course, the courts attempt to ascertain the meaning in which the testator employed the word.

[20]See the interpretation of homestead exemption laws [*Lobban v. Vander Vries Realty & Mortgage Co.*, 48 Ariz. 180, 60 P.2d 933 (1936); *In re Dittemore's Estate*, 152 Kan. 574, 106 P.2d 1056 (1940); *Brooks v. Collins*, 74 Ky. 622 (1876); *January v. Marler*, 274 Mo. 543, 203 S.W. 817 (1918); *Carle v. Bamberger*, 53 Okla. 777, 158 P. 599 (1916); *First Nat'l Bank v. Sokolski*, 62 Tex. Civ. App. 324, 131 S.W. 818 (1910); *Real Estate Land Title & Trust Co. v. Street*, 85 S.W. 2d 341 (Tex. Civ. App., 1935)]; insurance policies [*Hosmer v. Welch*, 107 Mich. 470, 67 N.W. 504 (1896); *LeRoux v. Edmundson*, 276 Minn. 120, 148 N.W. 2d 812 (1967); *Tomlyanovich v. Tomlyanovich*, 239 Minn. 250, 58 N.W. 2d 855 (1953)]; garnishment exemptions [*Jorboe v. Jorboe*, 106 Mo. App. 459, 79 S.W. 1162 (1904)]; workman's compensation statutes [*Holmberg v. Cleveland-Cliffs Iron Co.*, 219 Mich. 204, 189 N.W. 26 (1922)]; and widow's allowances [*In re Rash's Estate*, 256 S.W. 525 (Mo. Ct. App. 1923)].

relatives)[21] or have defined "family" in a manner similar to the definition reviewed by this Court in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974): "One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants.[22]

Municipal zoning ordinances, designed to create geographical areas for family living and to achieve other social objectives, were upheld by this Court in the late 1920's against challenges based on substantive due process. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183

[21]*See, e.g., Village of Riverside v. Reagan*, 270 Ill. App. 355 (1933). The zoning cases which interpret the term "family" uniformly assume that "family" includes blood relatives, extending family to include boarders, lodgers, servants and others who reside with the family. See, e.g., *Town of Henrietta v. Fairchild*, 53 Misc. 2d 862, 279 N.Y.S. 2d 992 (1967); *Carroll v. Arlington County*, 186 Va. 575, 44 S.E. 2d 6 (1947).

[22]A random survey by counsel of eighteen Greater Cleveland municipalities disclosed only one suburb (Lyndhurst) with an ordinance similar to East Cleveland's. One other suburb (Warrensville Heights) has an ordinance similar to the 1961 version of the East Cleveland ordinance; see n.38, *infra*. All the others are substantially identical to the "blood, marriage or adoption" ordinance at issue in *Village of Belle Terre*. The municipalities surveyed were Bay Village, Beachwood, Brookpark, Fairview Park, Garfield Heights, Lyndhurst, Maple Heights, Mayfield Heights, Middleburg Heights, North Olmstead, Olmstead Falls, Pepper Pike, Richmond Heights, Rocky River, Shaker Heights, South Euclid, Warrensville Heights, and Westlake.

Most of the cases which present questions about *unrelated* persons involve ordinances wherein family is defined in terms of those persons related by blood, marriage or adoption. See, e.g., *City of Des Plaines v. Trottner*, 34 Ill. 2d 432, 216 N.E. 2d 116 (1966); *City of Newark v. Johnson*, 70 N.J. Super. 381, 175 A.2d 500 (1961).

(1928). Subsequently a series of state court decisions interpreted the term "family" even more broadly than blood relatives, to include groups of unrelated individuals living together as functional families.[23] Then

[23]A number of these cases simply permitted non-related individuals to live in an area where family is broadly defined or where there is no definition of family. *Brady v. Superior Court*, 200 Cal. App. 2d 69, 19 Cal. Rptr. 242 (1962); *Neptune Park Ass'n. v. Steinberg*, 138 Conn. 357, 84 A.2d 687 (1951); *Oliver v. Zoning Commission of Town of Chester*, 31 Conn. Sup. 197, 326 A.2d 841 (1974); *County of Lake v. Gateway Houses Foundation, Inc.*, 19 Ill. App. 3d 318, 311 N.E. 2d 371 (1974); *Robertson v. Western Baptist Hospital*, 267 S.W. 2d 395 (Ky. 1954); *City of Takoma Park v. County Board of Appeals for Montgomery County*, 259 Md. 619, 270 A.2d 772 (Md. Ct. App. 1970); *Shuman v. Board of Aldermen of Newton*, 282 N.E. 2d 653 (Mass. 1972); *Stafford v. Incorporated Village of Sands Point*, 200 Misc. 57, 102 N.Y.S. 2d 910 (1951); *Application of LaPorte*, 2 App. Div. 2d 710 152 N.Y.S. 2d 916 (1956).

Other cases held ordinances to be unduly restrictive in their limitations on unrelated persons. *Village of University Heights v. Cleveland Jewish Orphans' Home*, 20 F.2d 743 (6th Cir. 1927), cert. denied, 275 U.S. 569; *Women's Kansas City St. Andrew's Society v. Kansas City, Mo.*, 58 F.2d 593 (8th Cir. 1932); *Timberlake v. Kenkel*, 369 F. Supp. 456 (E.D. Wisc. 1974); *City of Des Plaines v. Trottner*, 34 Ill. 2d 432, 216 N.E. 2d 116 (1966); *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 281 A.2d 513 (1971); *Taxpayers' Ass'n of Weymouth Twp. Inc. v. Weymouth Twp.*, 125 N.J. Super. 376, 311 A.2d 187 (1973); *Gabe Collins Realty, Inc. v. City of Margate*, 112 N.J. Super. 341, 271 A.2d 430 (1970); *Marino v. Mayor and City Council of Norwood*, 77 N.J. Super. 587, 187 A.2d 217 (1963); *East House v. Riker*, 72 Misc. 2d 823, 339 N.Y.S. 2d 511 (Sup. Ct. 1973); *Jewish Consumption Relief Society v. Town of Woodbury*, 230 App. Div. 228 (1930).

See also *Boston Edison Protective Ass'n v. Paulist Fathers*, 306 Mich. 253, 10 N.W. 2d 847 (1943); *Carroll v. City of Miami Beach*, 198 So. 2d 643 (Fla. App. 1967). *Cf., Missionaries of La Sallette v. Whitefish Bay*, 267 Wis. 609, 66 N.W. 2d 627 (1954).

in 1974 this court in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) upheld the power of municipalities to limit the number of unrelated persons who could live together as a single "family," thereby reaffirming the authority of a local community to zone for protection of "family needs." 416 U.S. at 9.[24]

Belle Terre is a decision which builds on the concept of family as embodied in that village's ordinance, namely "persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit." It protects the right of a village which was composed solely of single family dwellings with a per person occupancy ratio of slightly over three persons per dwelling, to preclude a semi-transient[25] group of college students from turning a single family dwelling into what amounted to a lodging house. Had Belle Terre attempted to define families to exclude

[24]Compare *Young v. American Mini Theatres, Inc.*, ____ U.S. ____, 44 U.S.L.W. 4999 (1976) which upholds the authority of a city to regulate, via zoning, adult entertainment establishments, in part to protect family values.

Even after *Village of Belle Terre*, the lower courts have distinguished it to permit functional families to persist. See *O'Grady v. Town of North Castle*, 43 U.S.L.W. 2345 (S.D.N.Y. 1975); *White Plains v. Ferraioli*, 34 N.Y. 2d 300, 313 N.E. 2d 756 (1974); *Group House of Port Washington v. Board of Zoning Appeals*, 370 N.Y.S. 2d 433, 82 Misc. 2d 634 (Sup. Ct. 1975); *Moore v. Nowakowski*, 46 App. Div. 2d 996, 361 N.Y.S. 2d 795 (1974); *Little Neck Community Ass'n v. Working Organization for Retarded Children*, p. 10, col. 5, N.Y.L.J. (9/17/75), *aff'd* CCH Pov. L. Rprt. ¶22, 696 (May 3, 1976).

[25]None of the students were still living in Belle Terre when that case was heard. In contrast, the Moore family has remained intact (execution of the criminal sentence has been stayed) during the appeal of this case.

certain blood relatives, this Court would have been presented with a far different case. As the Village pointed out in its brief to the Court:

> The Village of Belle Terre did not define what a family is. Thousands of years of Western Civilization and every other civilization have done that. Whether it be the extended family of a more leisurely age or the nuclear family of today the role of the family in raising and training successive generations of the species makes it more important, we dare say, than any other social or legal institution - executives, legislatures, courts, corporations or student fraternities. If any freedom not specifically mentioned in the Bill of Rights enjoys a "preferred position" in the law it is most certainly the family. Appellants' Brief at 26.

II.

BY PRECLUDING APPELLANT AND HER SON AND GRANDSON FROM ESTABLISHING A HOME TOGETHER IN EAST CLEVELAND, THIS ORDINANCE UNCONSTITUTIONALLY INVADES THE FAMILY'S RIGHTS OF PRIVACY AND FREEDOM OF ASSOCIATION.

The fundamental rights to establish a home, to control the upbringing of children and to family life are established by the confluence of several interrelated constitutional doctrines principally within the concepts of freedom of association and the right to privacy.

By denying her the right to live with and raise her grandson, the East Cleveland ordinance in question invades Mrs. Moore's constitutional rights to privacy

and freedom of association in two ways: it invades her privacy, and that of her son, in making parental decisions concerning the upbringing of her grandson; and it denies her, and the rest of her family, the right to establish a home together.

A. The Ordinance Invades the Privacy of Family Decisions Concerning the Nurturing of Children.

Parental decisions about the upbringing of children have always been protected by our Constitution. In *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944) it was stated that "it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." This protected area of child rearing has been reinforced by successive decisions of the Court and includes the right to have one's child learn a foreign language, *Meyer v. Nebraska,* 262 U.S. 390 (1923) and the right to provide one's children with religious training as well as secular training, *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). See also *Prince v. Massachusetts, supra.*

These early cases were based on an analysis of the concept of liberty as guaranteed to citizens against arbitrary governmental interference by the due process clause of the Fourteenth Amendment. Their vitality has been reaffirmed in several recent decisions. In *Wisconsin v. Yoder,* 406 U.S. 205 (1972) this Court addressed the

fundamental importance of parental control over the nurture of children in the context of a state's attempt to interfere with Amish families in the education and religious activities of their children:

> Ths history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. *Wisconsin v. Yoder,* 406 U.S. at 232.

The following term, in *Roe v. Wade,* 410 U.S. 113 (1973), this Court held that the right to privacy, as exemplified by its extension to family relationships and the education and rearing of children, also protects "a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. This decision upheld the right of a parent to make, free from state interference, the initial and basic decision about the nurturing of children – whether or not to have a child. Similarly, *Paris Adult Theater I v. Slaton,* 413 U.S. 49 (1973), confirms that the right of privacy encompasses and protects "the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing." 413 U.S. at 65. *Accord, Griswold v. Connecticut,* 381 U.S. 479 (1965); *United States v. Orito,* 413 U.S. 139 (1973). This right to the companionship, care, management, and custody of one's children is fundamental and is far more precious than property rights. *May v. Anderson,* 345 U.S. 528, at 533 (1953); *Stanley v. Illinois,* 405 U.S. 645 (1972).

While most of the decisions discussed above focus on the right of biological parents to raise their children, it is clear that the concept of "parent" extends equally to

blood-related persons occupying the role of parent. Thus, in *Prince v. Massachusetts, supra,* the right was recognized to include the decisions made by an aunt who was raising her niece, a relationship substantially similar to the relationship between Inez Moore and her grandson. This conclusion is inevitable in light of the studies, referred to at p. 9-13 of this brief, showing the crucial role in child rearing played by "substitute parents" in subcultures of our society and in situations where tragedy has taken one or both of a child's parents. This conclusion is reinforced by the centuries-old preference accorded grandparents in the common law of natural guardians[26] and by the deference historically given to grandparental decision-making over children upon the death or disability of one or more of the child's parents.[27]

[26]See *Ratcliffe's Case*, 3 Co. 38 b (1592) and accompanying commentary in 76 English Reports 713, 715 n a. More recently see *In re Hall*, 235 N.C. 697, 71 S.E. 2d 140 (1952); *In re Guardianship of Moran*, 116 N.J. Super. 238, 281 A.2d 816 (1971). These latter cases prefer grandparents to other relatives in the creation of natural guardianships.

[27]Plymouth colony records provide striking illustrations of the role of grandparents in raising children. The will of a Swansea, Massachusetts man provided that "conserning all my five children, I do wholly leave them all to the ordering and disposing of my owne father . . . for him to bring them up not once questioning but that his love and hate for them wil bee as it hath bine for my selfe." Demos, *A Little Commonwealth: Family Life in Plymouth Colony*, p. 121 (1970).

In another case, a step-father of four children about to marry again writes to the children's grandfather to ask what he should do. The grandfather asks that one child be sent for him to raise, while one will be sent to a trade and two kept at home. The author comments that the striking thing is the manner in which this was decided. It was assumed that ultimate responsibility for the children's welfare belonged not to their step-father (who had known them on intimate terms for some five years) but to their grandfather (who probably had never seen them at all). This is a powerful comment on the importance which the colonists attached to ties of blood. *Id.*, pp. 122-23.

The right to privacy in family decisions concerning the nurturing of children applies to the appellant Inez Moore. She has raised her grandson John Jr. since the child's mother died when he was less than a year old. She has provided him with maternal care and affection for nine years and today stands as if she were the child's natural mother. The living arrangements for her grandson, and other decisions about his upbringing, are a product of the joint responsibilities of the appellant and the boy's father. The right to privacy protects their authority and judgment over the rearing of appellant's grandson John Moore, Jr.

If protected child rearing decisions extend to the choice of language and religious instruction for the child, they must indeed include the fundamental decisions of where and with whom the child shall live. In this instance the choice of a living arrangement for the child is a choice of maternal care for the child, a choice crucial to the child's survival. Without a family arrangement, the other protected child-rearing activities – education, religious training, and teaching of family and moral values – are meaningless.

B. The Ordinance Denies All Members of the Moore Family Unit the Right To Establish a Home Together and to Define the Composition of their Family.

This case challenges the determination by a municipality that it is unlawful and punishable by criminal sanctions for a grandmother, two sons, and two grandchildren to make a joint decision to maintain a home together for their mutual support and benefit.

These relatives have a constitutional right, guaranteed by their rights to privacy and freedom of association, to build upon their blood relationship and maintain their familial association in a residential context. This right is complementary to the right of parents to control the nurturing and rearing of their children.

The right to privacy has been recognized in many decisions of this Court. While it is nowhere explicitly mentioned in the Bill of Rights, its roots have been found in the First Amendment, *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); the Fourth and Fifth Amendments, *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 484-5 (1965) (Goldberg, J., concurring); the penumbras of the Bill of Rights, *Id.*, at 484-485; and in the concept of liberty guaranteed by the Fourteenth Amendment, *Id.*, at 500 (Harlan, J., concurring). *Roe v. Wade*, 410 U.S. 113, 153 (1973).

Many of the zones of privacy established by the leading cases overlap at a central focus – the composition of the family home. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969). The home itself has long been considered to be a sanctuary of personal privacy. "The sanctity of a man's home" and "the privacies of life," *Boyd v. United States*, 116 U.S. 616, 630 (1886), *Griswold v. Connecticut*, 381 U.S. at 484, are closely intertwined and interdependent concepts. Many of a citizen's rights to privacy are restricted to a place, the home, where a zone of privacy protects a myriad of personal decisions and actions. *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973); *Stanley v. Georgia, supra; United States v. Orito*, 413 U.S. 139 (1973).

The right of privacy is particularly applicable to an individual's decision to marry and create a family. *Roe v. Wade*, 410 U.S. 113 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479; *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The fundamental decision of "whether to bear or beget a child," *Eisenstadt v. Baird*, 405 U.S. at 453, is in essence a decision to determine the extent of one's own offspring and indeed the extent of one's own family.

In *Roe v. Wade, supra*, the court analyzed several factors surrounding a woman's decision to have an abortion that placed such a decision in the protected zone of privacy. These factors included the distress for the mother and the other members of the family caused by an unwanted child and the problems caused by bringing a child into a family unable, psychologically and otherwise, to care for it. Both of these factors rest on the idea that disruption of a family unit by the state violates the individual's right to privacy.

Another source of the right of family members to establish a home together is their freedom of association. The right of individuals to freely associate has long been held to be implicit in the First Amendment freedoms of speech, assembly and petition. *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Healy v. James*, 408 U.S. 169 (1972); *NAACP v. Button*, 371 U.S. 415 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958). At the center of the First Amendment freedom of association is the conviction that the integrity and vitality of human association should be protected from unwarranted governmental interference. This conviction extends to protect association not only for political ends, but to other forms of associational activity,

"whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." *NAACP v. Alabama,* 357 U.S. 449, 460 (1958). Thus, the court has extended First Amendment protection to associations for economic purposes, *United Mine Workers of America, District 12 v. Illinois Bar Assn.,* 389 U.S. 217 (1967), *cf., Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), and to associations for social, professional, avocational and religious purposes, *Shelton v. Tucker,* 364 U.S. 79 (1960).

This Court has indicated that freedom of association among family members for family purposes is entitled to at least as much protection. Marriage is an association of a protected character. *Griswold v. Connecticut,* 381 U.S. 479 (1965). Similar recognition was given to the protected associational aspects of marriage in *Boddie v. Connecticut,* 401 U.S. 371 (1971). As discussed in *United States v. Kras,* 409 U.S. 434, 444 (1973), "the denial of access to the judicial forum in *Boddie* touched directly on the marital relationship and on the associational interests that surround the establishment and dissolution of that relationship." See also *Loving v. Virginia,* 388 U.S. 1 (1967).

As marriage is an association, so is the family in its inclusion of children, parents, grandparents, brothers and sisters. Cf. *Prince v. Massachusetts, supra.* In contrast to the students in *Village of Belle Terre v. Boraas, supra,* the purpose of this association among the members of the family unit is the preservation of individual family members, the preservation of the family itself, and indeed the preservation of society. As termed by the early Puritans, the family is "the root

whence Church and Commonwealth cometh" and is "the foundation of all societies."[28]

These principles of freedom of association coalesce around the common denominators of the family home and the composition of the family.[29] The concepts are inseparable. The establishment of a family home is in itself a decision about who will share that home. These are matters of intensely personal choice and matters which society has historically considered to be beyond the province of legitimate governmental intrusion, "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 639-40 (1974).

Such family matters are not unique to the textbook nuclear family, but as the relevant literature shows[30] and as common sense tells us, they are common to all families. Surely Mrs. Moore's decision to establish a home wherein John Jr. may live with her is no less

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[28]Cotton Mather, *A Family Well-Ordered*, p. 3, as quoted in Morgan, *The Puritan Family*, p. 143.

[29]See the opinion of Mr. Justice Harlan in dissent in *Poe v. Ullman*, 367 U.S. 497, 551-52, as quoted with approval by Mr. Justice Goldberg in his concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965):

> Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home deprives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.

[30]See the materials on the family cited at pp. 9-13, *supra.*

intimate than a similar decision made by the child's natural mother, were she alive. To consider otherwise would be to disfavor many of the families of our forefathers[31] and many natural families in con-

[31]Many of the nation's most eminent citizens established or were raised in family settings which East Cleveland defines as illegal. John Adams, busy with diplomatic duties and political activity, sent a daughter to live with her aunt. His son John Quincy Adams, later to be the nation's sixth President, lived with a brother and an aunt and uncle, while being tutored for entrance into college. Hecht, *John Quincy Adams*, pp. 12-13 (1972).

Thomas Jefferson's parents took over the care of the children of his mother's cousin when the cousin's death left them orphans. They set up a household for seven years with their four children and the four children of the deceased cousin. Peterson, *Thomas Jefferson and the New Nation*, pp. 6-7 (1970).

When James Buchanan, a bachelor, took office as the fifteenth President, he moved in with his sister and his sister's son, aged twenty-four. Klein, *President James Buchanan: A Biography*, pp. 124-128, 273-75 (1962).

Herbert Hoover, at age six, lived with an uncle in Arkansas after his father died. His mother died two years later, which required that arrangements be made for raising the three Hoover children. A grandmother took one child. An aunt and uncle took another, and another aunt and uncle assumed guardianship of Herbert Hoover. Between the ages of ten and seventeen he was raised by another uncle, who saw him as the replacement for his own eldest son who had recently died. Lyons, *Herbert Hoover: A Biography*, pp. 10-22 (1964).

While her father was sick, Eleanor Roosevelt lived with her mother and aunt. Two of her brothers were brought up by another aunt. Her mother died when she was eight. The widowed father, still sick and unable to raise his children, died two years later. The three Roosevelt children were then raised in a household containing their grandmother, two uncles, and two aunts. Roosevelt, *The Autobiography of Eleanor Roosevelt*, pp. 3-17 (1958).

Others include Stephen A. Douglas [Johannsen, *Stephen A. Douglas*, pp. 5-11 (1973)], Millard Fillmore [Rayback, *Millard Fillmore: A Biography* (1972)] and William Cullen Bryant [Brown, William Cullen Bryant, pp. 14, 34 (1971)].

temporary society.[32]

By arbitrarily ruling out certain groupings of blood-related family members, the City of East Cleveland has substantially interfered with the right of the Appellant and her children and grandchildren to, as enunciated in *Meyer v. Nebraska*, 262 U.S. 390 (1923), "establish a home and bring up children." This interference is indeed substantial. The ordinance's restrictive definition of "family" applies to all dwelling units within the municipal boundaries of East Cleveland. There exists no dwelling unit within that community where the Moore family may reside without Mrs. Moore being subjected to fine and imprisonment.

In theory Mrs. Moore could sell her home and leave East Cleveland, as long as other communities do not adopt similar ordinances. To uproot herself and her family, however, would be economically unfeasible and would be extremely disruptive to her family.[33] As a homeowner, she has, in addition to the personal rights discussed above, a protected property interest in her home in East Cleveland. To force surrender of her property rights is to place an unconstitutional burden on the exercise of her rights of privacy and freedom of association. *Dunn v. Blumstein*, 405 U.S. 330, 331 (1972).

Moreover this Court has never recognized the unpleasant option of selling one's home and relocating

[32]See pp. 11-13, *supra*.

[33]Mrs. Moore is not in a financial position to move. To illustrate, this case has proceeded throughout *in forma pauperis* and the Appellant is represented by counsel from the Legal Aid Society of Cleveland.

elsewhere as a release mechanism which strips a citizen of his constitutional rights. In the prior zoning-related decisions of this Court the availability of such an option has never served to justify an invasion of rights. See *Buchanan v. Warley*, 245 U.S. 60 (1917); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). See also *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). The city-wide exclusionary feature of the East Cleveland ordinance is in sharp contrast to the zoning ordinance in *Young v. American Mini Theatres, Inc.*, ____ U.S. ____, 44 U.S.L.W. 4999 (1976). There the City of Detroit was found to have permissibly regulated the location of adult movie theatres *within* the city through the vehicle of an ordinance which did not interfere with the freedom of the distributors and exhibitors to market their product in the city.

C. The Appellee Can Tender No Compelling Governmental Interest To Sustain This Overly Broad Ordinance.

While the rights of privacy and freedom of association are not absolute, they can only be infringed in order to substantially advance a compelling governmental interest. *Roe v. Wade*, 410 U.S. 113 (1973); *Williams v. Rhodes*, 393 U.S. 23 (1968); *NAACP v. Button*, 371 U.S. 415 (1963); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Prince v. Massachusetts*, 321 U.S. 158 (1944). The burden of showing that a governmental interest is compelling is heavy, and rests upon the state. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, (1974); *Roe v. Wade, supra.*

In considering the nature of the governmental interests behind this ordinance, it should again be stressed that the ordinance interferes in perhaps the most direct and drastic way possible with the right to nurture children and the right of a family to establish a home together. The ordinance here goes far beyond the indirect and incidential effect upon constitutional rights that was found fatal in *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974); *Healy v. James*, 408 U.S. 169 (1972), and *NAACP v. Button, supra.* This ordinance expressly and flatly prohibits certain family members from living together, and enforces this prohibition by criminal prosecution, fine, and imprisonment.

The City of East Cleveland justifies the challenged ordinance as limiting population density, traffic congestion, and school population; it is also asserted that this ordinance serves the governmental interests of ease of enforcement and the maintenance of property values. None of these governmental interests has ever been deemed so "compelling" as to justify an invasion of fundamental or First Amendment rights. At most, the concerns advanced by the city are matters of incidental importance to the community, untouched by the urgency or magnitude of a compelling state interest.

It is clear from the case law that a governmental interest is "compelling" only if it seeks to protect a paramount interest of society from substantial and serious harm. *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Roe v. Wade, supra*, for example, the Court found that the state had a legitimate interest in protecting a woman's life and health and the potentiality of human life in a fetus. Even these weighty concerns, however, were only deemed "compelling" after the third

trimester of pregnancy, when the fetus was viable and the magnitude of risk to the mother was greatest. A threat of substantial harm to the physical or mental health of a child has also been deemed "compelling," justifying state intrusion on First Amendment rights in some circumstances. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); see also *Prince v. Massachusetts, supra.* Compare *Runyon v. McCrary*, ____ U.S. ____, 44 U.S.L.W. 5034 (1976) (where the governmental policy against racial discrimination justified limited intrusion). Another area of governmental activity that may give rise to a compelling interest is national security, *Korematsu v. United States*, 323 U.S. 214 (1944), although even these interests are often insufficient to override First Amendment claims. *United States v. Robel*, 389 U.S. 258 (1967); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). The same is true of the state's interest in compelling all children to attend school up to a certain age. *Wisconsin v. Yoder, supra.*

Many other governmental interests, although legitimate, have been held to fall short of "compelling." The protection of the public fisc and the desire not to dilute government programs will not justify the invasion of fundamental rights, *Shapiro v. Thompson*, 394 U.S. 618 (1969), even though these are legitimate and important public concerns. Accord, *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). Nor can invasion of such rights be justified to discourage fraud in the receipt of governmental benefits, *Sherbert v. Verner*, 374 U.S. 398 (1963), *Memorial Hospital v. Maricopa County, supra;* to prevent a remote danger of confusion on the ballot, *Williams v. Rhodes, supra;* to maintain professional standards in an occupation, *NAACP v. Button, supra;* or for administrative

convenience, *Dunn v. Blumstein*, 405 U.S. 330 (1972).

The interest advanced by East Cleveland in justification of this ordinance are slight by comparison to the governmental interests that other cases have deemed compelling. There is no well documented (through the testimony of urban planners and others) threat to the very character of residential neighborhoods as was relied on to support a considerably less intrusive ordinance in *Young v. American Mini Theatres, Inc.*, ____ U.S. ____, 44 U.S.L.W. 4999 (1976). The ordinance does not seek to prevent substantial harm to any person's physical or emotional health, but rather engenders such risks for children and adults by breaking up families. While high property values may be important to a city, this purely economic objective cannot compare with truly compelling interests.[34] Increased traffic, large school attendance, and population density do not threaten the survival of the city in the manner of wartime threats to national security. *Korematsu v. United States, supra.* The interests that the ordinance purports to advance are at heart the protection of public facilities from dilution by additional people – a goal specifically determined not to be compelling in *Shapiro v. Thompson* and *Memorial Hospital v. Maricopa County, supra.*

Another fatal flaw in the ordinance is that it has no substantial effect on the governmental interests it purports to advance. East Cleveland has already passed laws requiring a certain amount of floor space for each resident; any additional effect that this ordinance has

[34] Ease of enforcement, one of the interests allegedly advanced by the ordinance, is nothing more than administrative convenience.

on population density is *de minimis*. Traffic congestion and school population are unlikely to be affected by the relationships of the persons living in a home. Property values will not be enhanced by the breaking up of family units, but will more likely deteriorate.

The ordinance is unconstitutional because of its overly broad sweep across fundamental rights. Even where a governmental interest is compelling, the state may not pursue it by means that unnecessarily interfere with the freedom of association or the right of privacy, but must choose a less restrictive method, if one is available, of accomplishing its goals. *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). As stated in the context of freedom of association, "(p)recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," *NAACP v. Button*, 371 U.S. 415, 438 (1963).

Thus an attempt to regulate traffic congestion through an ordinance such as this must fail in view of the variety of less restrictive alternative methods of achieving the same purpose such as motor vehicle taxes, specific traffic ordinances and traffic enforcement. Similarly East Cleveland cannot be permitted to regulate population density (and in turn the related goal of reduction in school population) by a family-definitional ordinance when it already has created effective mechanisms for achieving the same objectives. Residential areas under East Cleveland's existing zoning ordinances are classified with density control as an object into multiple dwelling, two family dwelling and single family dwelling uses. Within each dwelling unit, occupancy limits control the number of persons who may live in that unit; see p. 47, *infra*. The very

existence of these ordinances indicates conclusively that "means for achieving the same basic purpose" (*Griswold v. Connecticut*, 381 U.S. at 498) are available to East Cleveland without the need to invade an area of protected freedoms.

III.

THE ORDINANCE OFFENDS THE EQUAL PROTECTION CLAUSE AS IT SUBJECTS MEMBERS OF ONE CLASS OF FAMILIES TO CRIMINAL SANCTIONS WITHOUT ADEQUATE JUSTIFICATION.

The East Cleveland Ordinance classifies families into two categories: 1) those whose composition is encompassed within the definition of family provided in §1341.08;[35] 2) those consisting of any other grouping of relatives who live together as a single housekeeping unit.[36] Members of families in the first category are permitted to live together in East Cleveland; members

[35]This is basically the grouping of husband and wife with their unmarried children, with the following exceptions: one, but only one, parent of the husband or wife may live in the family; one, but only one, married child may live in the family with his or her spouse and children, provided the married child is dependent upon the head of the household for support; one, but only one, set of grandchildren may live in the family, again provided that the parent of such grandchildren is dependent upon the head of the household for support.

[36]This excludes many children, grandchildren, and parents of the head of the household, as well as all of his or her siblings, aunts, uncles, nephews, nieces, and other blood relatives.

of families in the second category are not. Size of the family is not a relevant factor in the definition of each class and, in fact, the number of persons permitted to occupy each dwelling unit is specified elsewhere in the municipal ordinances.

A. Since the Classification Infringes on Rights which are Fundamental under the Constitution, It Can Only Be Sustained upon a Showing that It Is Necessary to Promote a Compelling State Interest; Such a Showing Cannot Here Be Made.

Under the prior decisions of this Court, a classification which is inherently suspect, such as race, requires a compelling state interest to sustain it. See e.g. *McLaughlin v. Florida,* 379 U.S. 184 (1964). Similarly, a classification which invades one or more rights established as fundamental under the Bill of Rights will be subjected to the same strict scrutiny by the Court, and will require a compelling state interest to survive attack under the Equal Protection Clause of the Fourteenth Amendment. *Shapiro v. Thompson,* 394 U.S. 618 (1969).

> "But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest is unconstitutional." (Emphasis in original). 394 U.S. at 634.

In *Dunn v. Blumstein,* 405 U.S. 330 (1972) this Court emphasized that the standard enunciated in *Shapiro* is strict. The Court in *Dunn* quoted the *Shapiro* language quoted above, and added emphasis to the

work "necessary:" "*necessary* to promote a *compelling* governmental interest . . . (first emphasis in original)." *Dunn v. Blumstein,* 405 U.S. at 342. The Court in *Dunn* found that there was a compelling governmental interest at stake, but that the restrictions placed on individuals' rights to vote and to travel – fundamental rights – were not necessary. The restrictions were unnecessarily broad and overly inclusive.

> Here, there is simply too attenuated a relationship between the state interest in an informed electorate and the fixed requirement that voters must have been residents in the State for a year and the county for three months. Given the exacting standard of precision we require of statutes affecting constitutional rights, we cannot say that durational residence requirements are necessary to further a compelling state interest. 405 U.S. at 360.

See also *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 263 (1974); *Marston v. Lewis,* 410 U.S. 678 (1973); *Evansville-Vanderburgh A.A. Dist. v. Delta Airlines, Inc.,* 405 U.S. 707, 714 (1972); *Graham v. Richardson,* 403 U.S. 365, 375-6 (1971); *Cipriano v. City of Houna,* 395 U.S. 701, 704 (1969).

The requirement that the classification be *necessary* to promote the compelling interest can be seen also as a prohibition of overbreadth. If less drastic alternatives are available to accomplish the same goals, the statue sweeps too broadly and violates the Equal Protection Clause. *Shapiro v. Thompson,* 394 U.S. 637 (1969); *Shelton v. Tucker,* 364 U.S. 479, 488 (1960).

The City of East Cleveland has failed to demonstrate that the challenged ordinance promotes a compelling governmental interest. Prevention of overcrowding and traffic congestion are legitimate governmental interests,

but they do not rise to the level of compelling interests which are sufficient to justify the ordinance. See Part II(C) of this brief, *supra*, at p. 32. Furthermore, the restrictions placed on family privacy and association are not necessary to promote the interests which Appellee cites as underlying the ordinance. Limitations on the number of occupants per square foot are sufficient to protect the City's interests, and in fact the City has legislated such limitations.[37] Traffic congestion and parking can be directly regulated through traffic and parking ordinances, purposeful location of parking lots, etc. The breaking up of families is not necessary to maintain property values; if anything, such a destructive measure would reduce the quality of life in the city. Since alternative means of protecting the City's interests exist and in some cases have been utilized, it is clear that the City's interference in family composition is not necessary.

B. In Addition, the Classification Fails to Bear even a Fair and Substantial Relation to the Object of the Legislation.

Should Appellant's position that a stricter standard of review is required under the Equal Protection Clause by reason of interference with the fundamental rights of privacy and freedom of association be rejected, this classification nevertheless fails to pass muster under the "fair and substantial relation" test, the standard of review traditionally applied in zoning cases when no fundamental rights are threatened.

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[37] §1351.03.

After determining in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) that the case involved "no 'fundamental' right guaranteed by the Constitution," 416 U.S. 1, 7, the Court looked to *Reed v. Reed*, 404 U.S. 71 (1971) for the proper standard by which to measure the legislative classification. The full enunciation of the *Reed* standard is to be found at 404 U.S. 71, 75-76, in which the Court applies a line of equal protection cases including *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920). After acknowledging that the Fourteenth Amendment does not entirely deny the States the power to treat different classes of people differently, the *Reed* Court said:

> The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 561, 61 L. Ed. 989 (1920). 404 U.S. at 75-6.

This standard of review has been relied upon by the Court in a number of Equal Protection cases decided subsequent to *Reed*. See e.g. *Johnson v. Robinson*, 415 U.S. 361 (1974); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Stanton v. Stanton*, 421 U.S. 7 (1975). The "fair and substantial" phraseology is identical to the articulation of the appropriate standard of review in the early zoning cases which measured zoning laws against the

dictates of substantive due process. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

This test by no means provides automatic validation for legislative classifications. See e.g. *Weinberger v. Wiesenfeld, supra; Stanton v. Stanton, supra;* and *Reed v. Reed, supra.* The test focuses on the actual, as opposed to hypothesized, legislative purposes, and excludes those conjured-up hypothetical purposes which could not rationally have been the object of the legislation. See *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The test also requires that the fair and substantial relation be grounded on some plausible view of empirical reality; wholly unsubstantiated speculation is insufficient. *Eisenstadt v. Baird, supra; Department of Agriculture v. Moreno, supra.* In addition, the legislative goal sought to be achieved by the regulation must be legitimate. Otherwise, the classification fails without further analysis, *Department of Agriculture v. Moreno*, 413 U.S. 528, 534-5 (1973).

There exist no City Council minutes nor committee reports which might assist this Court in identifying the purposes of the ordinance in question.[38] Under the

[38]The legislative history, as Appellant can best reconstruct it, is as follows: In 1922 East Cleveland was zoned into various traditional categories, including single family, two family and multiple family uses. See generally, *State ex rel. Killeen Realty Co. v. East Cleveland*, 108 O. App. 99, 153 N.E. 2d 177 (1958), *aff'd*, 169 O.S. 375, 160 N.E. 2d 1 (1959). In 1953 a definition of family was added to the ordinance:

> *Section 1.014* A "family" is any number of individuals related to the nominal head of the household as husband or wife, son or daughter, father or mother, sister or brother, or their spouses and dependent children living together as a single housekeeping unit and having facilities for cooking and sleeping in that part of the premises occupied by it. A "family" may consist of one individual. [Ord. No. 4761; Nov. 17, 1953]

(continued)

City's Charter, which lists the permissible purposes of city legislation, the City may:

> . . . define, prohibit, abate, suppress, and prevent all things detrimental to the health, morals, comfort, safety and convenience and welfare of the inhabitants of the City and all nuisances and carrier thereof; may regulate the construction,

(footnote continued from preceding page)

A narrower definition was adopted in 1961 at the time a Housing Code was adopted in East Cleveland (apparently leaving the previous definition on the books):

> Section 3-7 *Family.* A "family" is a number of individuals related to the nominal head of the household, living as a single housekeeping unit in a single dwelling unit, but limited to the following:
>
> A. Husband or wife of the nominal head of the household;
>
> B. Son or daughter of the nominal head of the household and the spouse and dependent children of such son or daughter;
>
> C. Father or mother of the nominal head of the household or of the spouse of the nominal head of the household;
>
> D. Dependent brother or sister of the nominal head of the household or of the spouse of the nominal head of the household, which brother or sister is not living with his or her spouse, and his or her dependent children.
>
> A family may consist of one individual. [Ord. No. 5320; Mar. 21, 1961]

In 1964 the present language of §1351.02 limiting occupancy of any dwelling unit to one family was added. [Ord. No. 5587; Nov. 17, 1964]. Finally, the definition of family was amended to reflect its present form on July 26, 1966. Ordinance No. 5743 amended previous section 1.014 and Ordinance No. 5744 amended previous section 3-7. Evidently these sections were later combined and renumbered, without change, in Ordinance No. 6010.

height, and the material used in all buildings and the maintenance and occupancy thereof; . . . and may pass such ordinances as may be expedient for maintaining and promoting the peace, good government and welfare of the City, and for the performance of the functions thereof . . ." Charter of the City of East Cleveland, Section 1.

The Housing Code of the City of East Cleveland, which contains the ordinance under which Appellant was convicted, is preceded by a statement of its purposes:

> Within the scope of this Housing Code as hereinafter defined, the purpose of this Housing Code is: to establish minimum standards necessary to make all dwelling structures safe, sanitary, free from fire and health hazards, and fit for human habitation and beneficial to the public welfare; to establish minimum standards governing the maintenance of dwelling structures in such condition as will not constitute a blighting or deteriorating influence on the neighborhood and the community; to protect property values and to maintain the character and appearance of the community and neighborhoods within the community; to fix responsibilities for owners and occupants of dwelling structures with respect to sanitation, repair and maintenance . . . . Housing Code of the City of East Cleveland, Section 1343.02.

Appellee asserts, at least in part based on the above purpose clauses, the following legislative purposes:

> Therefore, Section 1341.08 is needed to prevent such multiple family habitation in a single family dwelling, to prevent overcrowding, traffic and parking congestion, an undue burden on East Cleveland's school system, the diminution of the property value and character of the neighborhood; and to fix responsibilities for enforcement purposes; all of which are proper exercises of the police power for the public welfare of the community. (Appellee's Motion to Dismiss at p. 13).

Appellee's justifications must be individually considered.[39]

1. To prevent multiple family habitation in a single family dwelling.

This is a legitimate legislative goal, but to state it as the justification of the challenged ordinance is to beg the question. Appellant does not dispute the City's right to preclude more than one family from occupying a single family dwelling unit. If the City's power to pass

---

[39]The 1966 amendments to the ordinance excepted John Moore, Jr. from the definition of "family". Previously his presence in East Cleveland would have been legal.

In the 1960's and very early 1970's, the City of East Cleveland experienced an abrupt change in its racial character. The city borders on Cleveland proper and as the black migration within Cleveland moved eastward, East Cleveland shifted from an all white community to a nearly all black community. Mrs. Moore, who is black, entered East Cleveland during this time of change.

Between 1965 and 1967, the two years which lie on either side of the date this ordinance was restrictively amended to exclude, *inter alia*, most grandchildren, the East Cleveland public schools shifted from 10% black (1965) to 59% black (1967). Source: documents submitted by East Cleveland School Board in *Moore v. Visci*, Cuyahoga County Common Pleas, #913,922. In this connection, see the discussion at p. 49, *infra* concerning the purported justification for this ordinance in terms of controlling the school population.

such legislation were the issue, then the challenged statute would be §1351.02, which provides that "the occupancy of any dwelling unit shall be limited to one and only one family. . . ." Appellant has no quarrel with this section, which, together with the introductory paragraph of §1341.08, prevents two families of unrelated individuals from occupying the same dwelling unit. Two *separate* families of related individuals are also prevented from sharing a single dwelling unit by §1341.08 which provides that "family means a number of individuals related . . . [and] *living in a single housekeeping unit*" (emphasis added).

The issue before the Court is not whether two families may live in a single family dwelling unit. Rather, it is whether the City may define "family" in such a way as to exclude Inez Moore, her two sons, and her two grandsons from the definition.

2. To prevent overcrowding.

This purpose, in essence the control of population density, is legitimate. *Village of Belle Terre v. Boraas, supra.* However, there is no "fair and substantial" relationship between this purpose and the family-definitional ordinance at issue. Section 1341.08 has nothing to do with the size of the household; rather, it concerns itself with the *relationships* of the family members. Some large families (for example, a mother and father and their ten children) will fall within the definition of "family" in the ordinance, and thus be allowed to live in a single family dwelling unit. Other smaller families (the Moore family, for example, which has only 5 members) will fall outside the definition of

"family" and will not be allowed to live in a single family dwelling unit, no matter how large that unit may be.[40] Indeed, many two relative households are prohibited, such as a home consisting of two elderly sisters or two college age brothers. The ordinance permits one unmarried child to have an unlimited number of dependent children and remain in the household; however, should a second unmarried child bring a single child of his or hers into the home, the group is no longer a "family" and is not permitted to live together in East Cleveland.

These examples demonstrate that the language of the ordinance is not even loosely tailored in the direction of density control and therefore the ordinance bears no fair and substantial relation to this purported objective. Moreover, the ordinance, to the extent that it has *any* effect at all on the number of persons living in a given dwelling unit, is a form of overkill. East Cleveland has a per person occupancy ordinance expressly designed for this purpose and which establishes occupancy limits based upon logical criteria, namely the amount of living space in square foot terms available to each inhabitant. The family-definitional ordinance superimposes a second set of criteria (allegedly density oriented) which are arbitrary in that they contribute nothing of value to the achievement of the stated objectives. When §1341.08 is seen in conjunction with the per person occupancy limitation contained in §1351.02, the former section is as irrational as the double appeal bond requirement of the Oregon forcible entry and detainer statute stricken

[40]The City of East Cleveland has in fact informed Mrs. Moore that, under the density control ordinance, she may legally house seven persons in her home.

by this Court in *Lindsey v. Normet*, 405 U.S. 56 (1972) and as arbitrary as the household definition requirements for the food stamp program stricken in *Department of Agriculture v. Moreno*, 413 U.S. 508 (1973). In *Moreno* this Court rejected the Government's argument that the household-definitional section was rationally related to the legitimate purpose of controlling fraud in the food stamp program when the Act itself created civil and criminal provisions expressly designed for this purpose.

3. To prevent traffic and parking congestion.

This purpose is essentially a more particularized ingredient of the density-control objective, and is subject to the same fatal deficiencies. In addition, the question must be asked whether those persons excluded from the definition of family are likely to contribute to the traffic and parking congestion in East Cleveland. The answer is plainly no.

Mrs. Moore's family is a good example. According to East Cleveland, John Moore, Jr., presently 10 years old, is a second "family" and must, because of East Cleveland's need to reduce traffic and parking congestion, leave the municipality. No ordinance which is largely directed at minor children who have not achieved the lawful driving age and at elderly persons who are extremely unlikely to drive automobiles, bears a fair and substantial relation to this objective. Contrast the ordinance in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) which had the effect of excluding a combination of six college students. There is, it would seem, an empirical likelihood that six unrelated students

(all attending school outside of the community) would own and drive cars in substantially greater numbers than the typical blood-related family unit. This court noted that "the regimes of boarding houses, fraternity houses, and the like present urban problems. . . . [M]ore cars rather continuously pass by; more cars are parked." 416 U.S. at 9.

This classification bears no relationship to the traffic/parking objective because it primarily excludes those persons who are either unable or highly unlikely to drive and/or own a motor vehicle. It is probably more likely that the ordinance serves to complicate East Cleveland's traffic problems in its subdivision of families, thereby preventing a family from sharing a single automobile.

4. To prevent an undue burden on the school system.

Appellee argues that the challenged ordinance will limit traffic and parking congestion *and* that it will prevent an undue burden on the school system. Thus, it is Appellee's position that the ordinance will tend to weed out school age children *and* driving age adults. This dichotomy demonstrates that Appellee is simply trying to limit population through the use of the challenged ordinance. For the reasons discussed above, the ordinance is an impermissible means of pursuing that goal. **(See Part III(B)(2) of this brief, *supra* at p. 46).**

In addition to lacking a fair and substantial relation to the ordinance, the goal of lowering the burden on the school system is not, in this context, a permissible or legitimate governmental interest. Public education in Ohio is not a function of municipal government. It is a

State function and local school districts are creatures of the State government. While school districts are sometimes co-extensive with municipal boundary lines, they frequently, as in this instance,[41] do not align precisely with municipal boundary lines.[42] The municipal government of the city of East Cleveland has no authority to exclude children from the East Cleveland Public Schools.

> The right of a city to legislate does not extend to matters relating to the public schools. No plenary powers of control and maintenance of the common schools were granted to the municipalities of the state by the Constitution, and no board of education or legislative authority of any municipality has power to override or disregard any of the constitutionally valid legislative provisions applying to schools. Furthermore, local self-government has no relation to the administration of the common schools of the state. The home rule provisions of Article 18 of the Ohio Constitution were not intended to authorize municipalities to invade the field of the state or detract from its power to secure a thorough and efficient system of public schools.
>
> The only grant of power over public schools to local authorities in the Ohio Constitution is the provision in Article 6, §3, that each school district wholly or partly embraced within any city shall have the power to determine by referendum vote the number of members and the organization of its board of education, and that provision shall be

[41]The East Cleveland School District includes a substantial portion of the City of Cleveland Heights.

[42]O.R.C. §3311.02. See also O.R.C. §§3311.03, .04, .05 and .051.

> made by law for the exercise of this power by such school districts. 48 O. Jur. 2d, Schools, §4.

In addition to its lack of authority in general to legislate in this area, it should be noted that presumably, by this ordinance, East Cleveland is attempting to impermissibly regulate the right of students to attend school under state law. The State of Ohio has made school compulsory for children between the ages of six and eighteen. O.R.C. Chapter 3321. It has imposed the obligation of making free schooling available to all "school residents" between the ages of six and twenty-one on the school districts. O.R.C. 3313.64. "School residents" are defined in Ohio law as "all youth who are children or wards of actual residents of the school district." O.R.C. 3314.64. The language "ward" has been consistently interpreted in a broad sense to include children over whom an adult stands "*in loco parentis,*" even without the existence of a legal guardianship. 1918 Ohio Atty. Gen. 543; 1927 Ohio Atty. Gen. 160; 1932 Ohio Atty. Gen. No. 4864; 1963 Ohio Atty. Gen. No. 545. The City may not rely on a desire to circumvent this statutory scheme as a justification for the challenged ordinance.[43] Only a

[43]The facts in the instant case suggest that this impermissible objective may be behind the challenged ordinance. John Moore, Jr. was allowed to live unchallenged in East Cleveland during his pre-school years. When he attempted to attend school, he was initially accepted and then later asked to leave until such time as his grandmother secured guardianship over him, a wholly impermissible requirement under Ohio law. When Mrs. Moore objected (she eventually filed suit; *Moore v. Visci*, Cuyahoga County Common Pleas, No. 913,922) the Housing Department commenced its efforts to enforce §1341.08 against the child. This enforcement of the Housing Code hand-in-hand with the efforts of the school system to unlawfully exclude John, Jr. certainly suggests that the ordinance carries an illegitimate purpose.

legitimate state purpose can support a legislative classification against an Equal Protection challenge. *F.S. Royster Guano Co. v. Virginia,* 253 U.S. 412 (1920); *Reed v. Reed,* 404 U.S. 71 (1971).

5. To prevent diminution of property values and the character of the neighborhood.

Certainly on the face of things, no connection is apparent between the exclusion of John Moore, Jr. and the other family members excluded by this ordinance and "property values" or the "character" of the neighborhood. Perhaps behind this assertion lies a purpose of limiting the neighborhood to nuclear families composed only of fathers, mothers, and children. Assuming for the sake of argument that such a purpose is legitimate (such a purpose clearly conflicts with this country's historical deference to a more realistic concept of family),[44] the ordinance itself belies this purpose as it permits any one unmarried child to have any number of dependent children with him/her.

[44]See *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908, 911 (N.D. Cal. 1970):

> The traditional family is an institution reinforced by biological and legal ties which are difficult, or impossible, to sunder. It plays a role in educating and nourishing the young which, far from being "voluntary", is often compulsory. Finally, it has been a means, for uncounted millenia, of satisfying the deepest emotional and physical needs of human beings. A zoning law which divided or totally excluded traditional families would indeed be "suspect".

See also *Department of Agriculture v. Moreno*, 413 U.S. 528, 534-35 (1973).

6. To fix responsibility for enforcement purposes.

Again, on the face of this legislative scheme it is beyond the ken of the Appellant to envision how the classification in question serves to fix enforcement responsibility for §1341.08 or for any other ordinance. The very first paragraph of the ordinance (to which Appellant does not object) effectively fixes enforcement responsibility with the "head of the household:" " 'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit." The offensive exception clauses of the ordinance add nothing to the ease of enforceability of the ordinance. By illustration, Mrs. Moore could be prosecuted for violation of the permissible aspects of the ordinance (e.g. the prohibition against unrelated persons) just as conveniently without the objectionable exception clauses. Moreover it is doubtful that this kind of convenience justification is sufficient to support legislation under the fair and substantial relation test. *Kahn v. Shevin,* 416 U.S. 351 (1974). *Cf. Schlesinger v. Ballard,* 421 U.S. 906 (1975).

In conclusion, none of the six so-called purposes of this classification are sufficient to withstand scrutiny under the fair and substantial relation standard relied on in *Village of Belle Terre* and the classification must fail even disregarding the substantial interference which the ordinance has on interests deemed fundamental.[45]

[45]The due process clause is no longer as commonly relied on as a measure of the constitutionality of legislation. Present day analysis generally focuses on the Equal Protection Clause of the Fourteenth Amendment. Nevertheless the standards set by this court in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) and *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) have not

(continued)

CONCLUSION

The Appellant urges this Court to reverse the conviction on the grounds of the unconstitutionality of the ordinance upon which the conviction was based.

Dated, Cleveland, Ohio, July 2, 1976.

Respectfully submitted,

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(footnote continued from preceding page)
been overturned or questioned. *Nectow* commands that legislative zoning determinations "bear a substantial relation to the public health, safety, morals or general welfare." *Nectow v. City of Cambridge*, 277 U.S. at 188. For the same reasons why this ordinance's restrictive definition of the meaning of "family" fails to create a classification which can survive scrutiny under *Reed v. Reed*, 404 U.S. 71 (1971), it is similarly wanting under Fourteenth Amendment due process.

Supreme Court, U. S.
FILED
AUG 18 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975

No. 75-6289

INEZ MOORE,
Appellant,

vs.

CITY OF EAST CLEVELAND, OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR THE APPELLEE

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Supreme Court of the United States

October Term, 1975

No. 75-6289

INEZ MOORE,
Appellant,

vs.

CITY OF EAST CLEVELAND, OHIO,
Appellee.

On Appeal From the Supreme Court of Ohio

BRIEF FOR THE APPELLEE

QUESTION PRESENTED

Is a homeowner deprived of due process, or equal protection, or fundamental rights when municipal zoning ordinances, properly enacted under the police power of a municipality, define family to consist of one individual where said ordinances provide escape clauses to cover hardship cases and the homeowner fails or refuses to seek relief from any alleged hardship through the provisions embodied in such ordinances?

STATEMENT OF THE CASE

The facts in the present case, as shown by the transcript of the proceedings in the East Cleveland Municipal Court, Case No. 162307 are as follows: Appellant, Inez Moore is the part owner of a two family dwelling structure located at 1354-56 Garfield in the City of East Cleveland. Raiford Williams, the City Deputy Housing Inspector, came before the Clerk of East Cleveland Municipal Court and swore out a complaint that on or about the 30th day of January, 1974, that Inez Moore did unlawfully permit two families to occupy a single family dwelling unit of the structure at 1354-56 Garfield in violation of Section 1351.02 of Ordinance 6010 of the Ordinances of the City of Cleveland (A. 2).

The Appellant was summoned to appear in the East Cleveland Municipal Court and did so appear. A plea of not guilty was entered and a Motion to Dismiss was subsequently filed, heard and denied. The Appellant was found guilty upon stipulation of defense counsel that the said Appellant, John Moore, Sr., her son, John Moore, Jr., John Moore, Sr.'s son, Dale Moore, Sr., her son; and Dale Moore, Jr., the son of Dale Moore, inhabit the single dwelling unit here in question. By stipulating to a plea of guilty to a violation of Section 1351.02, Appellant conceded that the habitation of the dwelling by the above persons was in violation of Section 1351.02, Codified Ordinance 6010 of the Codified Ordinances of the City of East Cleveland (A. 115).

However, at the time of the citation of appellant, John Moore, Sr. was not a resident in the home. Instead, he lived in Cleveland, not East Cleveland, on Central Avenue (See Appendix to this Brief p. 29).

There is no evidence in the record below that Appellant made an administrative appeal of the citation as provided for in Chapter 1311 of the Codified Ordinances of East Cleveland.

SUMMARY OF ARGUMENT

The Supreme Court of Ohio correctly found that there was no substantial constitutional question thereby affirming the decision of the Court of Appeals of Ohio, Eighth District in which the court held that the East Cleveland zoning ordinances, in its definition of family, did not constitute a denial of equal protection or due process or appellant's fundamental rights.

The Supreme Court of Ohio correctly found no substantial constitutional question and the Court of Appeals of Ohio, Eighth District found that the City of East Cleveland has a compelling interest in acting in the best interest of the safety, health, welfare, and morals of its citizens. The means chosen were held to be a proper exercise of the police power by the City of East Cleveland and the procedure was reasonable and not arbitrary.

Further, appellant presented no evidence at the trial below and none is in the record to show that the City acted arbitrarily.

In the instant case, appellant was provided, through the codified ordinances of East Cleveland, with possibly three (3) means to obtain relief. Where appellant failed or refused to act to remedy the situation, there was no violation of any of her constitutional rights.

ARGUMENT

I. THE SUPREME COURT OF OHIO CORRECTLY FOUND THAT THERE WAS NO SUBSTANTIAL CONSTITUTIONAL QUESTION THEREBY AFFIRMING THE COURT OF APPEALS OF OHIO, EIGHTH DISTRICT IN WHICH THAT COURT HELD CONSTITUTIONAL THE EAST CLEVELAND ZONING ORDINANCE'S DEFINITION THAT "A FAMILY MAY CONSIST OF ONE INDIVIDUAL."

The case of *Belle Terre v. Boraas,* ..... U.S. ....., 94 S. Ct. 1536 (1974) involved a zoning ordinance of the Village of Belle Terre which defined the word "family". The definition in essence restricted a family to blood relatives and not more than two unrelated people living together. Six unrelated college students were living together in a house in a single family dwelling district. The owner of the house, Boraas, who was cited for a violation, contested the constitutional validity of the ordinance. Boraas raised numerous objections including the right to privacy and the right to travel. Justice Douglas, who is known as one of the staunch supporters of the absolutist theory concerning First Amendment rights, in writing the opinion of this Court, summarily dispensed with Boraas's arguments. To paraphrase Justice Douglas' statements at page 1540 of 94 S. Ct., there was no procedural disparity occasioned on some but not on others; the ordinance did not involve any fundamental right guaranteed by the Constitution including right to privacy and right of association. As Justice Douglas further stated:

> "We deal with economic and social legislation where legislatures have historically drawn lines which we

> respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable not arbitrary' (quoting *F. S. Royster Guano Co. v. Virginia,* 253 U. S. 412, 415, 40 S. Ct. 560, 561, 64 L. Ed. 989 and bears a rational relationship to a (permissible) state objective. *Reed v. Reed,* 404 U.S. 71, 76, 92 S. Ct. 251, 254, 30 L. Ed. 2d 225."

As to the contention of Appellee Boraas that if two unrelated people could constitute a family within the meaning of the ordinance, three or four should be also included, Justice Douglas stated that every line drawn by a legislature leaves some people out who might have been included; that it is an exercise of discretion left to the legislature not the judiciary. *Belle Terre v. Boraas,* ..... U.S. ....., 94 S. Ct. 1536, 1540 (1974).

Although the *Belle Terre* case dealt with unrelated persons, it is analogous to the present case since the question in both is the constitutional validity of an ordinance defining family. In both cases the legislative authority of the municipality has sought to promote the public welfare limiting the people who can dwell in a single family unit by defining the word family. Although Section 1341.08 of the ordinances of East Cleveland might seem more restrictive than the *Belle Terre* ordinance, it does not limit the traditional family composed of the parents and unmarried children, but even goes beyond that standard. Thus the rationale of the *Belle Terre* case that there is no violation of fundamental rights, that the "rational relationship" test should be applied, and that there is no disparity created by the line drawn by the legislature which will not be interfered with by the judiciary, should also be applicable to this case.

The case of *Palo Alto Tenants Union v. Morgan,* 321 F. Supp. 908 (Fed. Dist. Ct. N.D. Calif. 1970), *affirmed*

487 F.2d 883 (1973) involved the constitutionality of an ordinance defining family as persons related by blood, marriage or legal adoption, or not more than four unrelated persons.

Although that case centered on the provision for four unrelated persons, it is analogous to the present situation in that the constitutionality of a restrictive definition of family by a zoning enactment is involved.

The plaintiffs-tenants in the *Palo Alto* case asserted the arguments of freedom of association and right to family privacy, claiming them to be fundamental rights under the constitution, and therefore only to be infringed upon by a showing of compelling state interest, 321 F. Supp. 908 at 910. The Court rejected the tenants' arguments and held,

> ". . . the ordinance rational within the meaning of the equal protection and due process clauses of the 14th Amendment." *Id.* at 912.

In discussing validity of zoning classification the court related that such,

> ". . . classifications have generally been upheld if any state of facts can be conceived which would render the legislative decision reasonable. *Dandridge v. Williams,* 397 U.S. 471, 90 S. Ct. 1253, 25 L. Ed. 2d 491 (1970)." *Id.* at 911.

It is true as asserted by Appellant that the Court in the *Palo Alto* case suggested that a law which barred traditional families from single family dwelling districts might be suspect, *Id.* at 911. However, this is merely dicta and the court in this passage did not define "traditional family". Further, at page 912 of its opinion, the court stated that the average size of the traditional family is *less than* four people.

In summary, the *Palo Alto* and *Belle Terre* cases are analogous to the present case, since all three deal with the constitutionality of ordinances defining "family" for zoning purposes. The rejection of the free association, right of privacy and family privacy, fundamental interest, and the disparity in classification should also be applicable in the present case.

The Supreme Court of Ohio recognized the constitutional validity of the East Cleveland zoning ordinance by the dismissal of Appellant's appeal. Its decision should be sustained.

II. THE DECISION OF THE OHIO SUPREME COURT REAFFIRMS THE CONSTITUTIONAL VALIDITY, WITH RESPECT TO DUE PROCESS, OF THE EAST CLEVELAND ZONING ORDINANCES, ENACTED UNDER ITS POLICE POWER IN THE INTERESTS OF THE HEALTH, SAFETY, MORALS AND WELFARE OF THE COMMUNITY, IN PROVIDING THAT "A FAMILY MAY CONSIST OF ONE INDIVIDUAL".

In the case of *City of East Cleveland v. Seaborn Hilson,* East Cleveland Municipal Court, Case No. 101,060, the defendant Hilson was found guilty of violating Section 1351.02, Ordinance 6010, as interpreted by Section 1341.08, Ordinance 6010, of the City of East Cleveland. The defendant appealed on the grounds that Section 1341.08 was unconstitutional due to vagueness and violation of the due process clause of the Fourteenth Amendment, as well as on the grounds that the judgment was not supported by the weight of the evidence. Although the Court of Appeals, Eighth District, Cuyahoga County, reversed, holding that the judgment was not supported by the weight of the evidence, the Court also held that Section 1341.08 was

not unconstitutionally vague, and was not in violation of the Fourteenth Amendment. *Hilson v. City of East Cleveland,* Case No. 30544 (App. 1971). See Journal Entry in Book 40, pages 609, 610, journalized October 12, 1971, and corrected Journal Entry, Book 41, page 345, journalized October 17, 1971.

Even though there was no opinion written by the Court of Appeals in the *Hilson* case, the upholding of the constitutionality of Section 1341.08 in that case should be determinative in the present case. The applicability of the *Hilson* ruling to the present case should not be diminished by the fact that the Appellant here is relying more heavily upon an equal protection argument than due process of law. The test for the validity of a zoning enactment should still be the same—whether or not the ordinance is reasonable, not arbitrary, and related to the public health, safety and welfare. This is surely the test used by the Court of Appeals in the *Hilson* case in upholding the constitutional validity of Section 1341.08 of Codified Ordinances of the City of East Cleveland.

Section 1341.08 does not attempt to restrict the traditional family of parents and their minor children; rather it goes further than this allowing other blood relatives. To allow a municipality to enact and enforce an ordinance such as Section 1351.02 for single family dwelling zoning, which section appellant does not contest, and then to deny the municipality the right to enforce such ordinance by defining the word family as used in Section 1341.08, would be denying the effectiveness of single family dwelling zoning.

The rationale for Sections 1351.02 and 1341.08 of Codified Ordinance 6010 is readily apparent from the Charter of the City of East Cleveland and Section 1343.02, Ordinance 6010. Section 1 of the Charter of East Cleveland provides in part:

> "The inhabitants of the City of East Cleveland as its limits now are or may hereafter be, shall be a body politic incorporate by name of the City of East Cleveland, and as such shall have perpetual succession; . . . may define, prohibit, abate, suppress, and prevent all things detrimental to the health, morals, comfort, safety and convenience and welfare of the inhabitants of the City and all nuisances and carrier thereof; *may regulate* the construction, height, and the material used in all *buildings* and the maintenance and *occupancy* thereof; . . . and may pass such *ordinances* as *may be expedient for maintaining and promoting* the peace, good government and *welfare of the City,* and for the performance of the functions thereof . . ." (Emphasis added)

Section 1343.02, Ordinance 6010, of the City of East Cleveland sets the purpose of the Housing Code which includes Sections 1351.02 and 1341.08:

> "1343.02 PURPOSE.
>
> Within the scope of this Housing Code as hereinafter defined, the purpose of this Housing Code is: to establish minimum standards necessary to make all dwelling structures safe, sanitary, free from fire and health hazards, and fit for human habitation and beneficial to the public welfare; to establish minimum standards governing the maintenance of dwelling structures in such condition as will not constitute a blighting or deteriorating influence on the neighborhood and the community; to protect property values and to maintain the character and appearance of the community and neighborhoods within the community; to fix responsibilities for owners and occupants of dwelling structures with respect to sanitation, repair and maintenance; . . . ."

It is clearly apparent from the above quoted provisions of the Charter of East Cleveland and Section 1343.02, that the enactment and enforcement of Sections 1351.02 and 1341.08 are in the best interests of the community, to further the health, safety and welfare of the citizens of East Cleveland.

In addition, the limiting of the number of families in a single dwelling unit helps alleviate the congested parking and traffic problem in East Cleveland; more families generally mean more automobiles. Further, the burden on the school system of East Cleveland is apparent; if more than one family is allowed to live in a single family dwelling unit, the Board of Education will be burdened with a disproportionate number of students as compared to the revenue from real estate taxes generated to provide funds for the school system. Moreover, responsibility as to ownership is fixed for enforcement purposes. Disputes are minimized thereby promoting peace and tranquility.

It should also be noted that in the case of *Nolden v. East Cleveland City Commission,* 12 Ohio Misc. 205, 232 N.E.2d 421 (App. 1966) the Court of Common Pleas of Cuyahoga County upheld Section 1351.03, Ordinance 6010, entitled Habitable Floor Area.

As noted by the Court of Common Pleas in the *Nolden* case at page 210 of 12 Ohio Misc.:

> "There is no question but that the purposes of the housing code: fire safety, sanitation, health, crime prevention, maintenance of property, neighborhood, and community are mothers of public welfare, and are today well within the scope of the police power. In the recent case of *Reid v. Cleveland Heights,* 119 Ohio App. 67 (1963), the Cuyahoga County Court of Appeals held that the desire to maintain a 'high character of community development' is in the public interest and contributes to the general welfare."

It is obvious that the rationale of the above statement applies equally to Section 1341.08 since both 1341.08 and 1351.03 are directed to the same purpose as stated in Section 1343.02 and the Charter of East Cleveland.

Even though persons residing in a single family dwelling may not violate the person per square feet requirement of 1351.03, a situation such as the present one could arise where more than one family is inhabiting a single family dwelling. Therefore, Section 1341.08 is needed to prevent such multiple family habitation in a single family dwelling, to prevent overcrowding, traffic and parking congestion, an undue burden on East Cleveland's school system; the diminution of the property value and character of the neighborhood; and to fix responsibilities for enforcement purposes; all of which are proper exercises of the police power for the public welfare of the community.

Finally, a single family dwelling zoning which has been long recognized as constitutional, would be meaningless if the municipality could not effectively enforce it by measures such as Section 1341.08, Ordinance 6010, of the City of East Cleveland.

The courts have consistently held that the strong presumption of validity applicable to legislative acts in general also applies to zoning ordinances. *State ex rel. River Grove Park Inc. v. City of Kettering, et al.,* 118 Ohio App. 143, 149, 193 N.E.2d 547 (App. Montgomery County, 1962), citing *Curtiss v. City of Cleveland,* 170 Ohio St. 127 (1959). Also see *Cleveland Trust Co. v. Village of Brooklyn,* 92 Ohio App. 351, 359, 110 N.E.2d 440 (App. Cuyahoga County, 1952).

The test of whether a zoning regulation is valid and constitutional is whether it is reasonable and not arbitrary, and has a substantial relation to the public health, safety

and welfare. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S. Ct. 114 (1926). Also see *Nectaw v. City of Cambridge*, 277 U.S. 183, 48 S. Ct. 447 (1928). As stated by the Court of Appeals for Cuyahoga County in the case of *Pure Oil Division v. Brook Park*, 26 Ohio App. 2d 153, 154-155, 269 N.E.2d 853 (1971):

> "The underlying principle in determining the validity of all zoning enactments is whether or not that ordinance passed under the state's police power is related to the safety, health, and welfare of the community." See *Euclid v. Amber Realty Co.* (1926), 272 U.S. 365.

The courts have not been restrictive in determining what is proper for public welfare in the contest of zoning enactments. Justice Douglas, in writing the majority opinion for the United States Supreme Court in the case of *Belle Terre v. Boraas*, ... U.S. ....., 94 S. Ct. 1536, 1539 (1974) citing the case of *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, stated that the court in that case refused to limit the concept of public welfare which can be enhanced by zoning regulations:

> "The concept of public welfare is broad and inclusive . . . The values it represents are spiritual as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled."

(Quoting from the *Berman* case at pp. 32-33 of 348 U.S.). The same principle has been recognized in the Common Pleas Court of Cuyahoga County in the case of *Nolden v. East Cleveland City Commission*, 12 Ohio Misc. 205, 210, 232 N.E.2d 421 (App. 1966). By reason of the above authorities it is clearly apparent that what is for the

public welfare has been broadly interpreted by the courts in determining the validity of zoning enactments.

Even if the validity of the classification by the legislature for the purpose of zoning is fairly debatable, the judgment of the legislature will prevail. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, 47 S. Ct. 114 (1926). Also see *Cleveland Trust Co. v. Village of Brooklyn*, 92 Ohio App. 351.

It is also well established that a court will not substitute its judgment as to the wisdom of a zoning enactment for that of the legislature. *Cleveland Trust Co. v. Village of Brooklyn*, 92 Ohio App. 351, 359, 110 N.E.2d 440 (1952), *Pritz v. Messer*, 112 Ohio St. 628, 638-639, 149 N.E. 30 (1925).

The burden of proving that a zoning enactment is unreasonable and arbitrary, and therefore invalid, is upon the party challenging it. *Pearce v. Youngstown*, 100 Ohio App. 22, 25, 135 N.E.2d 430 (1954). The evidence that a zoning regulation is unreasonable must be clear and satisfactory. *Peebles v. State*, 25 Ohio L. Abs. 545, 546 (App. 1937), *dismissed for want of debate q.* 133 Ohio St. 130 (1937).

The Court of Appeals of Ohio, Eighth District, in affirming the decision of the trial court in the instant case, noted that the Constitution of the State of Ohio, Section 3, Article XVIII states:

> "municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Further the Court of Appeals, in the instant case held that:

> "Two reasons for enacting and enforcing Sec. 1341.08 are mentioned by counsel for East Cleveland in his brief: 1) to help alleviate traffic congestion, and 2) to lessen the possible financial burden on the city school system which would result from an inordinate number of school age children residing in a single dwelling which would consequently generate a disproportionately small real estate tax revenue per child.
>
> The defendant failed to present the trial court with any evidence to support her contention that Sec. 1341.08 is violative of the equal protection and due process clauses. Rather she rests on the assertion in her appellate brief, that the ordinance is unreasonable and arbitrary on its face. We disagree.
>
> A municipal ordinance enacted pursuant to the legislative exercise of local police power is valid unless it clearly bears no real and substantial relation to public health, safety, morals or general welfare. *Benjamin v. City of Columbus* (1957), 167 Ohio St. 103; *Curtiss v. Cleveland* (1959), 170 Ohio St. 127.
>
> As this court recently stated in syllabus 3 of *Alsenas v. City of Brecksville* (1972), 29 Ohio App. 2d 255:
>
> 'To prevail in such a case the complainant must also clearly establish that the ordinances he attacks do not bear a real and substantial relation to the public health, safety, morals or general welfare and are, in turn, unreasonable or arbitrary, that is, in substance, that the local legislative authority could not have reasonably believed or, in permitting such

> legislation to remain in force, cannot reasonably believe that the necessity of regulation in the public interest outweighs, qualitatively, the impact imposed on the individual property owner.'
>
> A duly enacted municipal ordinance is presumed to be constitutionally valid. The burden of establishing the unconstitutionality of such ordinance is upon the one challenging its validity. *Cleveland v. Antonio* (1955), 100 Ohio App. 334.
>
> Since the defendant presents no evidence to rebut the presumption of legislative validity, we find that Sec. 1341.08 bears a real and substantial relation to public health, safety or welfare and is, therefore valid. See *City of East Cleveland v. Palmer* (1974), 40 Ohio App. 2d 10."

Zoning enactments are presumed to be valid and appellant has failed to prove that Section 1351.02 as interpreted by Section 1341.08, is unreasonable, arbitrary or not related to the public health, safety and welfare. The wisdom of the legislature in providing for the health, safety and welfare of the community should not be usurped by the judgment of a Court. Finally, what is within the public welfare for zoning purposes has been widely interpreted by the Courts, and in the present case clearly includes Section 1341.08 of the Ordinances of the City of East Cleveland.

III. THE DECISION OF THE SUPREME COURT OF OHIO CORRECTLY UPHOLDS THE CONSTITUTIONALITY OF THE EAST CLEVELAND ZONING ORDINANCES WHICH STATE "A FAMILY MAY CONSIST OF ONE INDIVIDUAL", THAT FURTHER PROVIDES ESCAPE CLAUSES TO REMEDY ANY UNDUE AND UNNECESSARY HARDSHIP AND WHERE THE APPELLANT FAILS OR REFUSES TO SEEK RELIEF FROM ANY ALLEGED HARDSHIP THROUGH PROVISIONS EMBODIED IN SUCH ZONING ORDINANCES.

It has been contended that East Cleveland zoning ordinances should fail because the state (city) has shown no compelling state (city) interest. Surely, Appellant does not remotely suggest that the City of East Cleveland has no compelling interest in seeing that the sewer system, the water supply, city services (garbage collection, fire, police, and general maintenance and upkeep) are not unduly overburdened by demands which far exceed the resources.[1] It goes without saying that an excessive demand on the water and sewer system, through overcrowding, creates fire and health hazards. An understaffed police department presents numerous safety problems. Inadequate funds jeopardize the City's very existence.

---

1. Counsel for Appellee who was a resident of the City of East Cleveland from August 1964 until December, 1974 and has been employed, part-time, in the City's Law Department from September, 1973 to the present has intimate knowledge of the City. East Cleveland has a three (3) square mile radius with a population of approximately 40,000 people, many of them youths. Off-street parking is grossly inadequate. Except for a General Electric Plant, there is no major industry located in the City. East Cleveland, too, has experienced a decline in its tax duplicate.

Survival, health and safety are so obviously compelling state (city) interests that they would appear to be unrebuttable.

Appellant concedes that the city may pass ordinance § 1351.02 (Appellant's brief, p. 46). Instead, the essence of the query in her opinion is ordinance § 1341.08 (Appellant's brief, p. 46). However, Appellant fails or refuses to read the pertinent ordinances in total context which provided relief through various escape clauses. Appellant was cited for two families living where one family is suppose to live. Yet, Appellant admits two of her sons and their respective sons (her grandsons) were living with her (A. 7). However, records from the East Cleveland Housing Department show that *John Moore, Sr. did not reside in the home when the citation was issued,* instead, he lived in Cleveland on Central Avenue (Appellee's Appendix p. 29 (Emphasis added)).

In reading only ordinance § 1341.08, it would appear that Appellant should have been cited for having three (3) families living in a single dwelling. This was not an oversight (A. 4). Dale Moore, Sr. is not married and had his son Dale Moore, Jr. with him which indicates that ordinance § 1341.08 (b) excludes him. Ordinance 1313.01 (R) (2) allows Dale, Sr. and Dale, Jr. to live with Appellant as unlicensed roomers (Appellee's Appendix p. 24). There was no evidence presented below showing that neither Dale Moore, Sr. nor John Moore, Sr. is a dependent child. Thus, the choice was actually the Appellant's; she could decide which son and grandson would live with her as unlicensed roomers and let the other able bodied son find a separate residence.

Appellant had a second remedy, Appellant could have obtained guardianship for John Moore, Jr. With able counsel to represent her in the suit against the East Cleveland Board of Education and Appellee, guardianship would have

been a simple and wise choice, particularly since John Moore, Sr. was not living on the premises at that time.

The legislators who enacted Chapter XIII and the accompaning ordinances, had the foresight to provide another escape clause to remedy hardships. The illegal occupancy citation was discussed, reviewed, inspected and reinspected over a considerable period of time before the complaint was filed in the East Cleveland Municipal Court (Appellee's Appendix pp. 25-30). If the enforcement of the ordinance caused the hardship lamented about in the first thirty-two (32) pages of Appellant's brief, an appeal on the basis of hardship could have been made to the Board of Zoning Appeal and if need be to the City Commissioners (Appellee's Appendix pp. 22-23). Relief, possibly with some stipulation(s) would probably have been granted.[2]

It is clear from the record below that Appellant neither appealed the deputy housing inspector's citation to the Board of Zoning Appeal nor did she lodge an appeal with the City Commission. Where the legislature has established a procedure for appealing adverse decisions, that administrative procedure must be exhausted before one can seek a court remedy. Thus, Appellant's failure to exhaust her administrative remedy, by failing to file a timely appeal, precludes this appeal because she lacks standing to make it.

Appellant urges that the ordinance discriminates against her and denies her the fundamental rights of freedom of association and the right to privacy. First, none of the cases cited by Appellant gives grandmothers any fundamental rights with respect to grandsons. Instead, they in-

2. Counsel for Appellee served as legal advisor to the Board of Zoning Appeal for the City of East Cleveland from September, 1973 until August, 1974, and even now on occasion provides legal opinions.

volve fundamental rights between or among parents and husband and wife. Since, John Moore, Sr. the father and natural guardian of John Moore, Jr. has not relinquished custody of his son, Appellant does not stand in loco parentis to John Moore, Jr. Should John Moore, Jr. require emergency medical treatment from some occurrence at school, can Appellant give the prerequisite consent?

Appellant contends that the definition of family cuts arbitrarily and enumerates six hypothetical situations to highlight her contention. Those examples are untenable when analyzed against the entire Zoning Chapter of the City of East Cleveland. All situations listed are permissible under the proper procedure as either an unlicensed roomer, hardship cases, or guardianship.

CONCLUSION

For all the foregoing reasons, the Appellee urges this Court to affirm the decision below and to hold the challenged ordinance to be a constitutionally valid exercise of a Municipality's Police Power.

Respectfully submitted,

HENRY B. FISCHER
Director of Law

and

LEONARD YOUNG
Assistant Law Director and Prosecutor
City of East Cleveland
14340 Euclid Avenue
East Cleveland, Ohio 44112
Telephone: (216) 681-5020
Counsel for Appellee

APPENDIX

Charter of the City of East Cleveland

The pertinent part of the Charter of the City of East Cleveland is as follows:

CORPORATE POWERS, RIGHTS AND PRIVILEGES

SECTION 1. NAME AND POWERS.

The inhabitants of the City of East Cleveland, as its limits now are, or may hereafter be, shall be a body politic and corporate and by name The City of East Cleveland, and as such shall have perpetual succession; may use a corporate seal; may sue and be sued; may acquire property in fee simple or lesser interests or estate by purchase, gift, devise, appropriation, lease, or lease with the privilege to purchase for any municipal purpose; may sell, lease, hold, manage, and control such property, and make any and all rules and regulations by ordinance or resolution which may be required to carry out fully all the provisions of any conveyance, deed, or will, in relation to any gift or bequest or the provisions of any lease by which it may acquire property; may acquire, construct, own, lease and operate and regulate public utilities; may assess, levy and collect taxes for general and special purposes on all the subjects or objects which the City may lawfully tax; may borrow money on the faith and credit of the City by the issue or sale of bonds or notes of the City; may appropriate the money of the City for all lawful purposes; may create, provide for, construct, regulate and maintain all things of the nature of public works and improvements; may levy and collect assessments for local improvements; may define, prohibit, abate, suppress and prevent all things detrimental to the health, morals, comfort, safety, convenience and welfare of the inhabitants of the City,

and all nuisances and causes thereof; may regulate the construction, height, and the material used in all buildings, and the maintenance and occupancy thereof; may regulate the construction, location, size, height, and the materials used in all billboards, and the maintenance and use of the same; may regulate and control the use, for whatever purposes, of the streets and other public places; may create, establish, organize and abolish offices and fix the salaries and compensations of all officers and employees; may make and enforce local police, sanitary and other regulations; and may pass such ordinances as may be expedient for maintaining and promoting the peace, good government and welfare of the City, and for the performance of the functions thereof. The City shall have all powers that now are, or hereafter may be granted to municipalities by the Constitution or laws of Ohio; and all such powers, whether expressed or implied, shall be exercised and enforced in the manner prescribed by this Charter, or when not prescribed herein, in such manner as shall be provided by ordinance or resolution of the Commission.

Ordinances of the City of East Cleveland

Relevant East Cleveland Codified Ordinances are as follows:

CHAPTER 1311

Board of Building Code Appeals

1311.01 BOARD ESTABLISHED; COMPOSITION; NOTICE OF HEARINGS.

A Board of Building Code Appeals is hereby established, which shall consist of the City Manager, who shall act as the Chairman, the Director of Law, the Director of Health, the Chief of the Police Department and the Chief of the Fire Department, all of whom shall serve

until their successors are appointed and qualified. The City Engineer shall act as Secretary. All meetings of the Board of Building Code Appeals shall be public. Public notice shall be given of hearings on any appeal from a decision of any city official by the posting of a notice on the bulletin board in the main entrance of the City Hall for a period of at least three days, together with such additional notice, if any, that the Board of Building Code Appeals shall deem necessary. The Board of Building Code Appeals shall keep minutes of its proceedings. (Ord. 5636. Passed 6-1-65.)

1311.02 VARIANCES; RULES AND REGULATIONS.

The Board of Building Code Appeals shall determine all matters properly presented to it and where practical difficulties and unnecessary hardships shall result from the strict compliance with or the enforcement of the provisions of any ordinance for which it is designated as the Board of Appeals, such Board shall have the power to grant variances in harmony with the general intent of such ordinance and to secure the general welfare and substantial justice in the promotion of the public health, comfort, convenience, morals, safety and general welfare of the City. The Board shall also have the power to adopt from time to time such rules and regulations as it may deem necessary to carry into effect the provisions of any ordinance for which it is designated as the Board of Appeals. (Ord. 5636. Passed 6-1-65.)

1311.03 APPEAL PROCEDURE.

(a) Any person adversely affected by a decision of any City official made in the enforcement of any ordinance for which the Board of Building Code Appeals is designated as the Board of Appeals shall have the right to appeal to the Board of Building Code Appeals from such decision within ten days from the date notice of such decision

was given or mailed to him and to appear before the Board at a time and place fixed by the Board. Such appeal must be in writing. Failure to file a written appeal with the Board within the time prescribed shall constitute a waiver of the right of appeal. The Board shall have the power to approve, amend, modify or reverse any decision of such City official.

CHAPTER 1313

Rooming Houses, Hotels and Foster Homes

1313.01 DEFINITIONS.

* * * * *

(r) "Rooming house" means any building or part of any building, other than a hotel, occupied in such a manner that certain rooms are leased or rented to a roomer or roomers, as herein defined, by an owner or tenant under the following conditions:

1343.04 COMPLIANCE.

The owner, as defined in Section 1341.14, shall be responsible for compliance with all of the provisions of this Housing Code except where the responsibility therefor is specifically placed elsewhere. (Ord. 5432. Passed 11-20-62.)

1343.05 VALIDITY.

Sections and subsections of this Housing Code and the several parts and provisions thereof are hereby declared to be independent sections, subsections, parts and provisions, and the holding of any such section, subsection, part or provision thereof to be unconstitutional, void or ineffective for any cause shall not affect nor render invalid any other such section, subsection, part or provision thereof. (Ord. 5320. Passed 3-21-61.)

672-17-64

BUILDING CODE VIOLATIONS
PARCEL OWNERSHIP CHECK LIST

		Date	Owner's Name and Address
1.	City Plat Book	1-30-74	Inez Moore
2.	City Water Bill	1-30-74	Inez Moore
3.	Confirmation with Indicated Owner	1-30-74	Inez Moore
4.	County Auditors Records	1-30-74	Inez Moore

1/13/74 Inspection made by Raiford Williams. Property was found to have illegal occupancy in both suites and some structural violations.

1/16/73 Notice of violations sent to owner by R. Williams.

10/19/73 Reinspection of the property by R. Williams disclosed illegal occupancy not corrected. A request for Prosecutor's Hearing ordered.

11/8/73 Owner appeared in Prosecutor's office - was given 15 days to correct occupancy.

12/5/73 Reinspection of property by R. Williams disclosed illegal occupancy corrected on one side of dwelling - but has overflowed to other suite.

1/30/74 Reinspection of property by R. Williams and Ernest Williams disclosed only one illegal occupant. John Moore, Jr. (age 7) remains in violation of the East Cleveland Housing Code.
Case prepared for court.

Raiford G. Williams/g
Deputy Housing Inspector

Date: 1/30/74

Re: 1854-56 Garfield

A re-inspection of this property regarding a Notice of Violation dated 1/16/73, shows that violations 2-3-6 are corrected, and _____ partially corrected.

Violations 1-4-5 ere not corrected.

Violations _____ given extra time to comply.

Remarks: Reinspection with Inspector E. Williams disclosed that John Moore is still living with his grandmother, illegally, and still in Violation of East Cleve. Housing Code.

Case has been prepared for Court

Signed: Raiford G. Williams/v
Deputy Housing Inspector

26

Date: 12/5/73

Re: 1854-56 Garfield

A re-inspection of this property regarding a Notice of Violation dated 1/16/73, shows that violations 2-3 are corrected and _____ partially corrected.

Violations 1-4-5-6 ere not corrected.

Violations _____ given extra time to comply.

Remarks: Illegal occupancy still not corrected; Mrs. Carol Moore stated she was trying to find a place to move but has been unsuccessful so far.

Will prepare this for Court case.

Signed: Raiford Williams/v
Deputy Housing Inspector

27

PROSECUTORS'S OFFICE

Date: November 8, 1973

Re: 1854-56 Garfield Avenue

A re-inspection of this property regarding a Notice of Violation dated 1/16/73, shows that violations 2 & 3 are corrected, and 6 partially corrected.

Violations 1 - 4 - 5 & 6 are not corrected.

Violations _____ given extra time to comply.

Remarks: Owner appeared in Prosecutor's Office as requested has been given 15 days to correct occupancy.

Return tissue in 15 days.

Signed: Raiford G. Williams/g
Deputy Housing Inspector

28

29

PROSECUTOR HEARING REQUEST:

COMPLAINANT: NAME R. Williams

ADDRESS _____ TELEPHONE _____

ACCUSED: NAME Inez Moore

ADDRESS 1854 Garfield TELEPHONE _____

COMPLAINT: (brief) O. K. Failure To Comply

DATE AND TIME SET: Marshall L Howard Thurs. Nov. 8, 1973 at 8:15

OCT 22 1973

PROSECUTOR HEARING REQUEST:

COMPLAINANT: NAME R. Williams

ADDRESS _____ TELEPHONE _____

ACCUSED: NAME Daniel Moore

ADDRESS 1854 GARFIELD RE-SAME TELEPHONE _____

COMPLAINT: O.K. Failure To Comply

DATE AND TIME SET: OCT 23 1973 Thurs. Nov. 8, 1973 at 9:15

BEST COPY AVAILABLE

CITY OF EAST CLEVELAND
CITY HALL

January 16, 1973
Date

NOTICE OF VIOLATIONS OF ORDINANCES

Location 1834-36 Garfield

Owner of Title Ines and Daniel Moore Land Contract

Owner's Address 1834 Garfield Phone 761 2230

(Circle) OPERATOR-LESSEE-RESIDENT AGENT-CORPORATION

Address Phone

Type of Building 2½ story frame duplex dwelling

Authorized Occupancy Use 2 family

Present Occupancy 4 families
Illegal occupancy - in both suites

An inspection of the above addressed premises on 1/15/73 disclosed violation of the East Cleveland Ordinances. To comply with the minimum code requirements the following violations must be corrected:

SECTION VIOLATED		
1.	1351.02	The occupancy of a dwelling unit shall be limited to one, and only one family. Ms. Carole Moore and her son, Derik, age 8, are illegal occupants in suite 1836. . John Moore, Jr, (7) is an illegal occupant of suite 1834. Correct within 15 days.
2.	1351.11D	Repair leaking kitchen sinks in both suites. Repair laundry tub and bath tub in suite 1834. A permit is necessary. 15 days
3.	1351.17	Repair defective kitchen ceiling light and switch in 1834 suite. This is a hazardous condition. Correct within 15 days.
4.	1351.22B1	Repair defective window. Repair broken window pane to basement.
5.	1351.22B1	Repair defective door. Provide doorknob to rear door of kitchen of 1834 suite.
6.	1351.23	Repair interior walls. Plaster livingroom walls of suite 1834

Permitted Occupancy: 775 sq.ft. habitable floor area (each side)
One (1) family of 7 persons permitted (each side).

(BCH)

An inspection of this building will be made approximately the time given to correct the violations listed above. If no progress has been made at that time, this matter will be referred to the Law Department for legal action.
NOTE: Above violations must be corrected within 30 days (unless otherwise specified)
Office hours between 8 to 9 A.M. and 4 to 5 P.M. (PHONE: 681-5020)

Direct inquiries to Raiford G. Williams
Deputy Housing Inspector

Raiford G. Williams/jj

Supreme Court, U. S.
FILED
JUN 10 1976
MICHAEL RODAK, JR., CLERK

THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75-6289

INEZ MOORE

Appellant,

vs.

CITY OF EAST CLEVELAND, OHIO,

Appellee

On Appeal from the Supreme Court of the State of Ohio

MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

David L. Genger
David B. Hopkins

Counsel for
The American Civil
Liberties Union
1144 Union Commerce Bldg.
Cleveland, Ohio 44115
(216) 696-1144

Now comes the American Civil Liberties Union, through its attorneys, and moves, pursuant to Rule 42(3) of the Rules of the Supreme Court of the United States, that this Honorable Court grant leave for the American Civil Liberties Union to file a brief amicus curiae on behalf of Appellant Inez Moore for the reasons more fully set out below.

The City of East Cleveland, Ohio, Appellee herein, has refused to consent to the filing of a brief amicus curiae by the American Civil Liberties Union.

The American Civil Liberties Union proposes to present to the court in its brief amicus curiae legal and sociological arguments establishing the fundamental nature of the rights of Family Association and Family Privacy which have been unjustifiably infringed upon by Sections 1351.02 and 1341.08 of the Ordinances of the City of East Cleveland, in violation of the First and Four-

teenth Amendments to the Constitution of the United States. The American Civil Liberties Union is a public interest organization, and, as such, represents somewhat broader interests than the individual Appellant in this action, Inez Moore, who seeks to establish that an ordinance which prevents a grandmother, her two sons and their respective sons from living together as a single family is unconstitutional. The American Civil Liberties Union anticipates that this Court will consider the broad constitutional implications of the Ordinances of the City of East Cleveland challenged herein and avers that the American Civil Liberties Union is an appropriate advocate for those broader interests.

Wherefore the American Civil Liberties Union prays that this Honorable Court grant leave to the American Civil Liberties Union

to file a brief amicus curiae in this action on behalf of Appellant, Inez Moore.

Respectfully submitted,

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Supreme Court, U. S.
FILED
JUL 2 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-6289

INEZ MOORE,

Appellant,

—v.—

CITY OF EAST CLEVELAND, OHIO,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF GREATER CLEVELAND, *AMICI CURIAE*

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CITY OF EAST CLEVELAND, OHIO,

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ON APPEAL FROM THE SUPREME COURT
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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF GREATER CLEVELAND, AMICI CURIAE

INTEREST OF AMICI CURIAE

Leave to file a brief amicus curiae was granted the American Civil Liberties Union by order of the Court on June 21, 1976.

The American Civil Liberties Union files this brief to establish that the Ordinances of the City of East Cleveland at issue in this case, which prohibit the

appellant from living in the same home with all of her grandchildren, are unconstitutional. We believe the ordinances infringe fundamental rights in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

ORDINANCES INVOLVED

§1351.02 LIMITATION ON OCCUPANCY

The occupancy of any dwelling unit shall be limited to one, and only one, family and to any authorized persons occupying such dwelling unit with such family.

§1341.08 FAMILY

Family means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

(a) husband or wife of the nominal head of the household.

(b) unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them.

(c) father or mother of the nominal

head of the household or of the spouse of the nominal head of the household.

(d) notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

(e) a family may consist on one individual.

STATEMENT OF FACTS

The violation of the ordinances arises from the fact that appellant's home is occupied by herself, her elder son, his son, her younger son, and his son, John Moore, Jr., now ten years old. Under §1341.08(d), "family" is defined to exclude appellant's ten-year-old grandson. Appellant was convicted and sentenced to five days in jail and fined $25.00.

SUMMARY OF ARGUMENT

The effect of Appellee's ordinance

§1341.08, operating in conjunction with §1351.02, is to deny Appellant and her family the right to live in East Cleveland. Her right to determine basic family relationships and her rights of association and privacy in the family context are arbitrarily infringed by Appellee's ordinance despite the fact that this deprivation of fundamental rights is not necessary to promote any compelling interest of East Cleveland. This lack of relationship between the purposes asserted for the ordinance and the means chosen to further such purposes in itself is sufficient to constitute a violation of Equal Protection, but the ordinance is further flawed by its failure to draw its classification in such a way as to minimize intrusion on constitutionally protected rights. Even under the lesser degree of scrutiny applied to statutes not affecting fundamental rights the ordinance in issue here violates the Equal Protection clause because the classification it creates does not bear a reasonable relationship to the asserted purposes.

In addition to these Equal Protection violations, the ordinance fails to meet the requirements of the Due Process Clause. The right to free choice in matters of family life, the right to privacy in the family context and the right of free association are all protected "liberties" under the Due Process Clause, and the lack of relationship between the means and asserted ends of the ordinance alone renders it unconstitutional. A further Due Process

violation is found in the failure to choose the means which least affect fundamental liberties, as the ordinance deprives many families of their protected rights despite the fact that they do not contribute to the problems it attempts to control. Yet a conclusive presumption is raised that any family units outside the restrictive definition of "family" necessarily contribute to the problems of overcrowding of the schools and traffic congestion; such presumptions violate Due Process for their arbitrary deprivation of personal liberties.

Thus Appellee's ordinance §1341.08 is unconstituional for its violation of both the Equal Protection and Due Process Clauses and should be held void.

ARGUMENT

I. EAST CLEVELAND'S ORDINANCE DENIES APPELLANT EQUAL PROTECTION OF THE LAWS.

The effect of East Cleveland ordinance §1341.08 is to deny the Moore family, which has adopted its living arrangement out of necessity, the right to live in East Cleveland. This ordinance infringes fundamental rights but is not necessary to promote a compelling governmental interest and thus violates the Equal Protection Clause.

A. The Fundamental Nature of the Right Asserted by Appellant Prohibits Appellee From Infringing Such Right Without a Compelling Governmental Interest.

There are special constitutional protections afforded the family:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390,399 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince

> v. Massachusetts, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, at 399, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, and the Ninth Amendment, Griswold v Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).
>
> Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. . . "To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." Glona v. American Guarantee Co., 391 U.S. 73, 76-76 (1968). Stanley v. Illinois, 405 U.S. 645, pp. 651-652 (1972)

Thus the fact that Appellant's family is not an average nuclear family with a mother, father and children does not mean that the Constitutional protection afforded her is any the less. Yet the interest asserted by Mrs. Moore in this case is not simply the importance of the right to maintain her family unit. Her interest encompasses the right to pursue one's private interests and to associate freely with others

in so doing, a right which has been held to be clearly protected by the Fourteenth Amendment, N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958); this right should be especially protected in the family context. The right to privacy, emanating from several fundamental constitutional guarantees, has been upheld in various contexts but especially in situations bearing on family lifestyle and relationships, "a right of privacy older than the Bill of Rights," Griswold v. Connecticut, 381 U.S. 479, 486 (1965). In Stanley v. Georgia, 394 U.S. 557, 564 (1969), the Court said:

> [A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.
>
> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred, as against the Government, the right to be let alone --the most comprehensive of rights and the right most valued by civilized man." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Because of the fundamental nature of the interest which is infringed by Appellee's ordinance, "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a

compelling governmental interest, is unconstitutional." Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The asserted purposes of §1341.08--prevention of overcrowding, of burdening the schools and of traffic congestion--do not rise to the level of compelling interests.

Further, in this case the lack of direct relationship between the households excluded by §1341.08 and the evils the ordinance seeks to reduce is sufficient to render this ordinance unconstitutional, as the means are not necessary to promote the interests asserted by Appellee, whether or not such interests are compelling.

Yet even if a compelling interest furthered by East Cleveland's ordinance could be shown, such an interest alone is not sufficient to sustain the ordinance if the means chosen to protect that interest unnecessarily infringe protected freedoms. In scrutinizing durational residence requirements imposed on voting rights in Dunn v. Blumstein, 405 U.S. 330, 343 (1972), the Court stated:

> It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing the important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting consti-

tutional rights must be drawn with "precision," NAACP v. Button, 371 U.S. 415, 438 (1963); United States v. Robel, 389 U.S. 258, 265 (1967), and must be "tailored" to serve their legitimate objectives. Shapiro v. Thompson, supra, at 631. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." Shelton v. Tucker, 364 U.S. 479, 488 (1960).

The exclusion of many family units which would not contribute to the problems §1341.08 is intended to control renders the ordinance unconstitutional for its failure to employ the least intrusive means available. A more precisely drawn ordinance would avoid the infirmity of unnecessarily infringing the constitutional rights of those families who do not contribute to the problems the statute seeks to avoid. But the ordinance as it stands violates the Equal Protection Clause of the Fourteenth Amendment and is unconstitutional.

B. Even If Less Rigorous Scrutiny Is Applied the Means Chosen by Appellee Are Not Reasonably Related to the Purposes of the Ordinance and Violate the Equal Protection Clause.

The arbitrary nature of this ordinance is so apparent that even if the less rigorous, rational relationship test were applied it would be found to be unconstitutional. In assessing a statutory preference for male estate administrators where competing applications have been filed by both male and female members of the same entitlement class, the Court in Reed v. Reed, 404 U.S. 71, 75-76 (1971), described the applicable test as follows:

> The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

The Court there held that to give a mandatory preference to members of either sex simply for the purpose of eliminating hearings on the merits was precisely the arbitrary legislative choice forbidden by the Equal Protection Clause. The classification embodied in East Cleveland's ordinance is no less arbitrary, and the means by which Appellee has chosen to further the purposes

which it alleges are the basis for this ordinance are not fairly and substantially related to those purposes. The interests of the community in preventing excessive traffic problems and overcrowding of the schools, while legitimate, are not directly furthered by this ordinance, which is totally void of any reference to the number of persons living in any one dwelling but is instead based solely on the relationship of those persons and as such is an invidious discrimination against legitimate family relationships.

The Court relied on the Reed v. Reed formulation of the rational relationship test in Village of Belle Terre v. Boraas, 416 U.S. 1 (1973), to uphold a village ordinance which restricted land use to one-family dwellings and defined "family" to include one or more persons related by blood, adoption or marriage, or not more than two unrelated persons living as a housekeeping unit. The ordinance in question precluded large groups of unrelated persons from living as units in a family residential area, which would have upset the family orientation of the neighborhood. In contrast to Belle Terre's attempt to limit living units to a family of related members or an unmarried couple, the East Cleveland ordinance at issue here attempts to delimit what constitutes a family within the confines of blood relationships, resulting in an arbitrarily drawn line. Further, because of Appellant's family

relationships she has constitutionally protected rights not available to unrelated persons who group together for convenience, such as her rights of association and privacy in determining her family relationships. That the critical importance of family values is particularly relevant in the context of zoning was recognized by the Court in Village of Belle Terre v. Boraas, supra, at 9, which is based largely on the value of providing neighborhoods conducive to family life:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within Berman v. Parker, supra. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Given the critical nature of the interest asserted by Appellant in this case, an interest which this Court has consistently protected, the lack of any reasonable relationship between East Cleveland ordinance §1341.08 and the goals it seeks to fulfill creates a particularly invidious form of discrimination and it should be held unconstitutional for violation of the Equal Protection Clause.

II. THE EAST CLEVELAND ORDINANCE VIOLATES THE DUE PROCESS REQUIREMENTS OF THE FOURTEENTH AMENDMENT

Appellant's protected freedom to exercise her personal choice as to which family members she will reside with, her freedom of association and of privacy in the context of her own home, have been denied by East Cleveland's ordinance in violation of the protection afforded Appellant by the Due Process Clause of the Fourteenth Amendment. The necessary relationship between legitimate governmental goals and the means chosen to further such goals is missing from this statute, and the further failure to tailor the ordinance so as to minimize infringement on protected freedoms renders the statute unconstitutional. Further, the ordinance sets up an irrebuttable presumption, a legislative approach which has long been disfavored under the Due Process Clause.

A. The East Cleveland Ordinance Fails to Comply with the Fundamental Requirements of Due Process

The Due Process Clause of the Fourteenth Amendment prohibits the state from depriving any person of life, liberty or property without due process of law. In defining this protected liberty, the Court has said:

> Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to con-

> tract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923)

The basic rights asserted by Appellant in this case are her rights to free association and to privacy, in the very special context of family life. It is "beyond debate" that freedom of association is "an inseparable aspect of the 'liberty'" protected by the Due Process Clause, N.A.A.C.P. v. Alabama, 357 U.S. 449, 460 (1958). The Court has also stated that the right of privacy is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action . . ." Roe v. Wade, 410 U.S. 113, 153 (1973). Such rights become even more crucial when placed in the family context, the importance of which is such that this Court has determined that the right to free choice in family matters

is itself a due process protected liberty. In Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640 (1974), the Court said:

> This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. Roe v. Wade, 410 U.S. 113; Loving v. Virginia, 388 U.S. 1, 12; Griswold v. Connecticut, 381 U.S. 479; Pierce v. Society of Sisters, 208 U.S. 510; Meyer v. Nebraska, 262 U.S. 390. See also Prince v. Massachusetts, 321 U.S. 158; Skinner v. Oklahoma, 316 U.S. 535.

Appellant seeks to protect her right to determine basic family relationships and living arrangements on the basis of the needs of family members as opposed to an arbitrary definition of "family" imposed by the City of East Cleveland, as well as her broad rights to free association and privacy within the home. Any one of these rights in itself would be sufficient to invoke the protection of the Due Process Clause. Yet this ordinance fails to meet the criteria of due process.

As the Court stated in Meyer v. Nebraska, quoted supra, Due Process requires that where protected liberty is interfered with legislative action may not be arbitrary

or without reasonable relationship to a purpose within the competence of the state to effect. Thus as in Bates v. Little Rock, 361 U.S. 516 (1960), where the Court held that occupational tax license ordinances requiring local branches of the N.A.A.C.P. to disclose membership lists interfered with members' freedom of association and violated the Due Process requirements, the legitimacy of the goals sought to be furthered by the ordinances does not end the Due Process inquiry (361 U.S. at 524-25):

> It cannot be questioned that the governmental purpose upon which the municipalities rely is a fundamental one. . . But governmental action does not auotmatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance. When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.

Similarly in the present case the goals this ordinance is claimed to further may well be legitimate; however there is no reasonable relation between the means chosen and the ends they are intended to advance.

The means utilized here, a restrictive and unrealistic attempt to define what a family is, bear no relationship to the cited purposes of the East Cleveland ordinance, which generally relate to overcrowding, traffic congestion, undue burdens on the school system and community character. The classification drawn by the ordinance is unrelated to the number of persons that can be included in a family unit although the influences the ordinance seeks to control are basically a factor of numbers. The operation of this ordinance precludes families which are smaller than the number for which their dwelling is zoned, thus necessarily excluding families whose presence neither creates nor contributes to the evils sought to be controlled. This fatal overbreadth in the ordinance indicates the lack of reasonable relationship between Appellee's goals and the chosen means for carrying them out. The lack of reasonable relationship, which is more fully discussed in Appellant's Brief, controverts due process requirements and renders the ordinance unconstitutional.

The overinclusiveness of the category of families excluded from the ordinance is fatal on another Due Process ground: even where a governmental purpose is legitimate and substantial it cannot be pursued by means that broadly stifle fundamental liberties when the same ends can be more narrowly achieved. Shelton v. Tucker, 364 U.S. 479 (1960); Kusper v. Pontikes, 414 U.S. 51 (1973).

The Court in Shelton v. Tucker found that the state had a valid interest in inquiring into the competence and fitness of its teachers but that requiring each teacher to file annually an affidavit listing without limitation every organization to which he belonged or contributed in the past five years was an unnecessarily broad interference with a teacher's associational freedom. Similarly the East Cleveland ordinance is an unnecessarily expansive interference with Appellant's rights to free association, privacy and to determine her family life, for while some of the groups excluded from the statutory definition of family might contribute to the problems which the ordinance attempts to control it indiscriminately outlaws many family groups that would no more contribute to such problems than those families which fall within the statutory definition. The ordinance thus violates the Due Process Clause in two ways: the means chosen have no relationship to the legitimate ends, and the ordinance is not drawn so as to minimize infringement on constitutionally protected freedoms.

B. The East Cleveland Ordinance Creates a Conclusive Presumption That Families Not Within the Definition Will Contribute to Overcrowding and Traffic Congestion Problems, a Presumption Which Violates Due Process.

Appellee asserts that the purposes served by §1341.08's restrictive definition of "family" are the prevention of overcrowding, burdening the school system and traffic congestion. Families which do not fall within the definition have no opportunity to show that their presence in East Cleveland will not contribute to these problems; thus the ordinance raises a conclusive presumption that such family units will contribute to such problems, a presumption which violates Due Process mandates.

"Statutes creating irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments." Vlandis v. Kline, 412 U.S. 441, 446 (1973). This Court in that case declared unconstitutional under the Due Process Clause a Connecticut statute creating an irrebuttable presumption of non-residence for purposes of qualifying for reduced tuition rates at a state university, noting (412 U.S. at 452):

> [I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination.

Similarly in Cleveland Board of Education v. LaFleur, supra, the Court held

unconstitutional mandatory maternity leave rules which created a conclusive presumption that a teacher who is four or five months pregnant becomes physically unable to continue her duties (414 U.S. at 644):

> The mandatory termination provisions of the Cleveland and Chesterfield County rules surely operate to insulate the classroom from the presence of potentially incapacitated pregnant teachers. But the question is whether the rules sweep too broadly. See Shelton v. Tucker, 364 U.S. 479. That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor--or the school board's--as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.

The Court relied on the language of Vlandis v. Kline, supra, in finding the conclusive presumption not necessarily or universally true in finding the rules violative of Due Process. Similarly in

the present case the irrebuttable presumption raised by the East Cleveland ordinance is not universally true, and as in both Vlandis v. Kline and Cleveland Board of Education v. LaFleur there are reasonable alternative means of making the crucial determination. Investigation as to the number of persons in a household, the number of school age children and cars, could easily be made, and in fact such investigations are undoubtedly already carried on to insure that certain other zoning provisions, such as those regulating maximum number of person who can inhabit one dwelling, are complied with. While it might be argued that such investigations would be an administrative burden on the city, such inconvenience is not sufficient to justify the unconstitutionality of a conclusive presumption. In Stanley v. Illinois, 405 U.S. 645 (1972), the Court held unconstitutional Illinois' procedure which conclusively presumed unwed fathers to be unfit parents, and stated (405 U.S. at 656-657):

> Despite Bell and Carrington, it may be argued that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's. The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes

higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and prehaps more than mediocre ones.

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

Thus in addition to the basic failure of Appellee to tailor the ordinance to Due Process requirements, the unnecessary use of an inaccurate conclusive presumption allowing no opportunity for rebuttal infringes upon Appellant's freedoms as protected by the Due Process Clause, rendering the ordinance unconstitutional.

CONCLUSION

The lack of any relationship between the asserted purposes of East Cleveland

§1341.08 and the classification it utilizes and the unnecessary infringement on constitutionally protected rights of those whose presence does not contribute to the problems the ordinance seeks to control constitute basic violations of Equal Protection, under either formulation of the applicable tests that have been applied by this Court, and further violations of Due Process requirements. For these reasons, East Cleveland Ordinance §1341.08 should be held to be unconstitutional and void.

Respectfully submitted,

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July 6, 1976

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 75-6289

INEZ MOORE,

~~Defendant~~-Appellant

-against-

THE CITY OF EAST CLEVELAND

~~Plaintiff~~-Appellee

ON APPEAL FROM ~~A JUDGMENT OF~~ THE SUPREME COURT OF OHIO

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ARGUMENT

I. THE VARIOUS "HARDSHIP" PROVISIONS CITED BY APPELLEE HAVE NO RELEVANCE TO THE APPLICATION OF THE ORDINANCE TO INEZ MOORE.

Inez Moore was criminally convicted for violation of a local housing code ordinance, specifically §1351.02 which incorporates the definition of "family" contained in §1341.08. [1/] Violation of this ordinance, by virtue of §1345.99, exposes a person such as Inez Moore to criminal liability of up to $1000 and six months in jail for each day which she allows her grandchild to remain in her home.

The Appellee cites three "hardship" provisions which allegedly soften the blow which §1351.02 (incorporating §1341.08) inflicts on the constitutional rights of family members. These three provisions are the roomer ordinances, the guardianship statutes and the administrative appeal provisions of §1345.08 and Chapter 1311 of the ordinances. Even assuming that these mechanisms perform the function attributed to them by Appellee, their existence is irrelevant to the situation of Inez Moore. Mrs. Moore was in fact convicted of violating §1351.02 for allowing her grandson John Jr. to live in her home. This conviction is in itself conclusive evidence of the irrelevance of these hardship provisions. Indeed, Appellee concedes at p. 17 of its brief, that the "roomer" ordinance offers no solace to John Jr. and Inez Moore. As to the other two "hardship" provisions, Appellee would contend that Inez Moore, a criminal defendant, has an affirmative obligation to seek relief thereunder. Even if relief were likely under these avenues (Appellant suggests in Part II that the opposite inference is more apt), there is no obligation on a criminal defendant to exhaust "administrative" remedies prior to allowing himself to be prosecuted for violation of a criminal statute. This construction of the exhaustion of administrative remedies doctrine [2/] is unprecedented and irrational. Not surprisingly, Appellee has cited no case law in support of its position.

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II. THE VARIOUS "HARDSHIP" PROVISIONS FAIL TO SAVE THIS ORDINANCE WHEN MEASURED AGAINST APPELLANT'S ARGUMENT THAT THE ORDINANCE UNDULY INTERFERES WITH THE RIGHTS OF BLOOD RELATIVES TO ESTABLISH A HOUSEHOLD TOGETHER.

Looking beyond the specific application of §§1351.02 and 1341.08 to Inez Moore and her grandson, these ordinances fail constitutionally because of their undue interference with the privacy and associational rights of blood relatives to establish a single household together. The so-called hardship or escape provisions cited by Appellee fail to save the ordinance when tested against this aspect of the Appellant's constitutional challenge.

As can be seen from an examination of the several ordinance provisions relating to roomers, the roomer provisions are actually quite limited. (See Reply Appendix, pp. 8-10). No child under 12 years of age and no aged (over 65) or infirm person may be considered a "roomer" without a special exception by the Board of Zoning Appeals; §1313.04. Any roomer must actually pay rent for the space which he occupies; §1313.01(r). The owner who collects the rent from the roomer must insure that his/her dwelling unit meets certain additional physical requirements; §1313.03. Finally, the resident owner of a single family home may have no more than two roomers on the premises and the resident owner of a two family dwelling (such as Inez Moore) may have no more than one roomer per dwelling unit. [3] §1313.01(s). The owner may only exceed these per person roomer limits if he/she purchases a license to operate a rooming house (§§1313.05, .06) and complies with all the additional requirements incident thereto. In addition there are no lower court decisions or other sources of information to support the apparent inference by the Appellee that the roomer provisions, despite these severe limitations, are applied so as to protect the rights of blood relatives to establish a household together.

The guardianship provisions of the Ohio Revised Code are also too limited to operate as safety valves for this ordinance, assuming arguendo that there is some reason to believe that they have been relied upon to perform this function. Ohio Revised Code Chapter 2111 creates procedures for the appointment of guardians for minors and incompetent persons. Accordingly,

only where the family members excluded from a home in East Cleveland are minors or incompetent persons, does Chapter 2111 provide any ostensible relief. Even then there are important reasons why guardianship may not serve as a meaningful avenue. The child's parents are natural guardians over the child (O.R.C. §2111.08); in order for a non-parent to be appointed as guardian, the parent must consent and effectively surrender his legal right to care, custody and control over his child. [4] In the case at bar, for example, John Sr. would have had to surrender his legal rights as a father and a parent as a condition to the issuance of letters of guardianship in favor of his mother. The rights which he would thereby be asked to relinquish are themselves indisputably fundamental. To condition freedom from prosecution upon the relinquishment of such fundamental rights is itself a violation of the Bill of Rights. Dunn v. Blumstein, 405 U.S. 330, 338-42. Furthermore there is no assurance from the language of §§1351.02 and 1341.08 that Inez Moore would procure any greater protection from criminal prosecution if she were issued letters of guardianship over John Jr. The words "ward" or "guardian" appear nowhere in the ordinances. We have only counsel's unsupported assertion that guardianship is in fact a "remedy."

The third and final hardship or escape provision suggested by the City, an appeal to the Board of Building Code Appeals, likewise provides no reasonable promise as a cure to the constitutional defects of the ordinances. Counsel for the Appellee offers his personal observation that in Inez Moore's case, relief "probably" would have been granted, "possibly" with "some stipulation(s)." Appellee's Brief, p. 18. Yet the very terms of the ordinance itself, §1311.02 (Appellee's Appendix, pp. 22-24), prescribe variances only when "in harmony with the general intent of such ordinances [i.e. §1341.08, defining family] and to secure the general welfare and substantial justice in the promotion of the public health, comfort, convenience, morals, safety and general welfare of the City." If we accept at face value the contentions of the City at pp. 8, 10-11 and elsewhere in its brief to the effect that the application of §1341.08 to the Moore family and to other similar families is

necessary to the promotion of these very same objectives, then it is difficult to imagine the Board lawfully granting a variance in such instances. And indeed this conclusion is partially supported by the Board's action in City of East Cleveland v. Hilson, where it refused to grant a variance for certain family members. The owner of the property in Hilson was subsequently charged and convicted of violating the same ordinance under which Ms. Moore was charged. [5/] In addition it should be pointed out that in this case, Inez Moore was never notified of her 10 day appeal rights but was instead consistently instructed by City officials that her only remedy was to make her grandson, John Jr., leave the home. See Appellee's Appendix, pp. 25-28.

III. THE CITY'S ARGUMENT REGARDING HARDSHIP EXCEPTIONS UNDERSCORES THE IRRATIONALITY OF THE LEGISLATIVE SCHEME.

The Appellant's position is that regardless of which level of scrutiny is chosen by the Court to review this ordinance under the equal protection clause, the City's purported justifications for the exclusion of the Moore family and similar families from the municipality of East Cleveland are constitutionally inadequate. In this connection, the City's identification of various escape measures which can be utilized to get around §§1351.02 and 1341.08 seriously undercuts its assertion that these ordinances are necessary to the attainment of certain legislative goals. If the narrow definition of family in §1341.08 of the ordinances is so essential to the prevention of overcrowding, traffic congestion, undue school burdens, etc. as Appellee argues, then these purposes are hardly served by the existence of various "escape clauses" which allow for the easy circumvention of §1341.08. So viewed, these escape clauses are counterproductive and their very availability raises important doubts about the argued-for rationality of §1351.02 and §1341.08.

~~Dated, Cleveland, Ohio, October 21, 1976.~~

Respectfully submitted,

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FOOTNOTES

1/ The East Cleveland Ordinance under which Inez Moore was convicted has been referred to interchangeably as a housing code ordinance and as a zoning ordinance throughout Appellant's and Appellee's Briefs. The zoning label is slightly inaccurate. The following is a brief description of the legislative scheme.

The Planning and Zoning Code of the City of East Cleveland (Part Eleven of the ordinances) contains in §1101.11 (Reply Appendix, p. 6) a definition of family identical to the language of §1341.08. Part Eleven goes on to provide for the classification of various uses (U-1 being single family dwellings; double houses; two-family houses; U-2 being apartment houses; etc.) and provides in §1121.03 that "no building...shall be...used except in conformity with the regulations prescribed in this zoning ordinance." (Reply Appendix, p. 7). This provision is enforceable criminally via §1105.99 (Reply Appendix, p. 7).

In this case however, the City chose to proceed instead under the criminal enforcement provisions of its Housing Code. The Housing Code is Title V of Part Thirteen of the East Cleveland Ordinances; Part Thirteen is entitled "Building Code." While the Zoning Code of the City of East Cleveland was adopted in the City's infancy in 1922 to govern the development of the City, the Housing Code was not adopted until 1961, evidently in an effort to guarantee the safety and integrity of existing structures. As with any housing code, its provisions regulate such matters as habitable floor area, minimum size of sleeping rooms, heating capacity, rubbish and garbage disposal, flue connections, etc.; §1351.03 et seq. Enforcement is provided for by the certificate of occupancy mechanism (§1347.01), by inspections together with notice to the owner "to repair, improve or demolish the structure" (§1345.03(a); Reply Appendix p. 11), by notice to vacate and actions at law to compel compliance (§1345.04; Reply Appendix p. 11) and by criminal penalties (§1345.99; Reply Appendix p. 11). Its purpose clause was previously quoted at p. 44 of Appellant's Brief and the subsequent section, §1343.03, provides that its provisions are "supplementary" to other provisions of the ordinances. (Reply Appendix, p. 10).

The fact that the City of East Cleveland chose to prosecute Inez Moore for violations of a Housing Code section instead of a parallel provision in the Zoning Code is of little consequence except that, with this clarification, some of the pretended justifications for the restricted definition of family in §1341.08 appear to be even more illogical, specifically the assertion that among the legislative objectives of §1341.08 were the prevention of an undue burden on the school system and the prevention of traffic and parking congestion.

2/ Appellee states at page 18 of its brief:

> Where the legislature has established a procedure for appealing adverse decisions, that administrative procedure must be exhausted before one can seek a court remedy. Thus, Appellant's failure to exhaust her administrative remedy, by failing to file a timely appeal, precludes this appeal because she lacks standing to make it.

3/ Appellee's claim at p. 17 of its brief that both Dale Sr. and Dale Jr. were properly considered roomers in Mrs. Moore's two family dwelling is inconsistent with §1313.01(s).

4/ See generally 41 O. Jur. 2d, Parent and Child, §22.

5/ City of East Cleveland v. Hilson, East Cleveland Municipal Court, Case No. 101,060; reversed by the Court of Appeals for Cuyahoga County as Case No. 30544 (1971). Journal Entry: Book 40, p. 609, 610; Corrected entry at Book 41, p. 345 (1971).

The defendant and his wife resided in a single family dwelling together with their two unmarried sons; a daughter, the daughter's husband and two minor grandchildren; and a minor niece. The Board of Building Code Appeals granted a variance for the minor niece but refused to authorize the continued presence of the married daughter, her husband and children. Evidence was introduced at trial that the daughter and her husband were irregularly employed and were in fact dependent upon Mr. Hilson and that the per person occupancy limits were not exceeded. The Municipal Court found Mr. Hilson guilty. His conviction was reversed on appeal on the grounds that Mr. Hilson had established that his daughter, her husband and their children were dependent upon him within the meaning of §1341.08(d). In its journal entry the Court of Appeals also ruled that the defendant's arguments that the ordinance was unconstitutionally vague and deprived him of property without due process of law were not well taken.

APPENDIX

EAST CLEVELAND ORDINANCES:

529.01 ENDANGERING CHILDREN.

(a) No person, being the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of such child, by violating a duty of care, protection, or support. It is not a violation of a duty of care, protection or support under this section when the parent, guardian, custodian or person having custody or control of a child treats the physical or mental illness or defect of such child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

* * *

529.05 CURFEW.

No minor twelve years of age or under shall be upon the streets or sidewalks or in a park or any other public place during the period from darkness to dawn, nor shall any minor thirteen to sixteen years of age, inclusive, be upon the streets or sidewalks or in a park or any other public place between the hours of 11:00 p.m. and 5:00 a.m., nor shall any minor seventeen years of age be upon the streets or sidewalks or in a park or any other public place between the hours of midnight and 5:00 a.m. unless accompanied by a parent, guardian or some responsible person over the age of twenty-one years, or a member of his family eighteen years or older. * * *

PART ELEVEN - PLANNING AND ZONING CODE

1101.11 FAMILY

"Family" means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

(a) Husband or wife of the nominal head of the household;

(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided that such unmarried children have no children residing with them;

(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household;

(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

(e) A family may consist of one individual. (Ord. 5743. Passed 7-26-66.)

* * *

1103.01 PURPOSE.

The City of East Cleveland is hereby districted or zoned to promote the public health, safety, convenience, comfort, morals, prosperity and general welfare, including the promotion of home ownership, the protection of residence sections, the prevention of congestion, the increasing of trade and industrial efficiency, the conservation of property values, the assurance of adequate light and air and the limitation, control and regulation of buildings in the City in accordance with a well established plan of use, height, size and area for all property and its development in the City. (Ord. 4761. Passed 11-17-53.)

* * *

1105.01 ENFORCEMENT.

This Zoning Ordinance shall be enforced by the Building Inspector or Deputy Building Inspector, and wherever the term Building Inspector is used herein, it includes the Deputy Building Inspector. (Ord. 4761. Passed 11-17-53.)

* * *

1105.99 PENALTY.

Any person, or agent or officer of a corporation, who violates any of the provisions of this Zoning Ordinance shall for each offense be fined not more than one thousand dollars ($1,000) or imprisoned not more than ninety days, or both.

Each day such violation occurs or continues shall constitute a separate offense. (Ord. 4761. Passed 11-17-53.)

* * *

1121.03 COMPLIANCE WITH DISTRICT REGULATIONS.

Except as hereinafter provided, no building, structure or premises shall be erected or used except in conformity with the regulations prescribed in this Zoning Ordinance for the use, height, area and building line districts in which such building, structure or premises is located. (Ord. 4761. Passed 11-17-53.)

* * *

1125.09 ROOMING AND BOARDING HOUSES.

(a) In a dwelling or apartment occupied as a private residence, rooms may be rented or table board furnished to one or two persons in accordance with the provisions of sub-section (b) hereof, provided no window display or sign is used to advertise such use.

(b) Unless approved by the Board of Zoning Appeals, no person shall rent or lease premises or part thereof to roomers or furnish board in violation of the provisions of this subsection.

(1) In a single-family dwelling there shall not be more than two roomers.

(2) In a double house or a two-family dwelling there shall not be more than one roomer in each family unit except that upon written request by the owner and approval by the Board of Zoning Appeals there may be two roomers in one family unit and none in the other.

(3) In an apartment house there shall not be more than one roomer in each apartment.

(4) No person not living in such building shall rent or lease to any roomers.

(5) No person shall rent or lease to roomers on the third floor of any dwelling.

(6) No person shall rent or lease to roomers in the basement.

(7) No person shall furnish board to more than two persons.

(8) No person shall rent or lease rooms in any part of a building except his or her own suite or unit.

(9) Existing rooming houses, operated in Class U1 or U2 districts, may continue under temporary licenses, upon the approval of the Board of Zoning Appeals. (Ord. 4761. Passed 11-17-53.)

* * *

PART THIRTEEN - BUILDING CODE

TITLE THREE - LOCAL PROVISIONS

1313.01 DEFINITIONS.

* * *

(r) "Roomer" means a person other than a member of the family of a resident owner or of the family of a tenant, who rents one or more rooms, not constituting a complete dwelling unit, as a habitation in a dwelling or apartment house from such owner or tenant, except that all persons who occupy a dwelling unit on the third floor of any building originally constituting a dwelling shall be classed as roomers.

(s) "Rooming house" means any building or part of any building, other than a hotel, occupied in such a manner that certain rooms are leased or rented to a roomer or roomers, as herein defined, by an owner or tenant under the following conditions:

(1) A building in which rooms are rented to one or more roomers by an owner or tenant who does not reside in the building.

(2) A single-family dwelling in which rooms are rented to three or more roomers by a resident owner or tenant.

(3) A dwelling in which rooms are rented to one or more roomers on the third floor.

(4) A building containing more than one dwelling unit in which rooms are rented to two or more roomers by an owner or tenant occupying one of such dwelling units.

(5) A building in which a room or rooms are rented to be occupied by one or more roomers who are under twelve years of age or are infirm or aged.

For the purposes of this chapter, the words "rooming house" shall include motels, motor courts, lodging houses and tourist homes not meeting the requirements of a "hotel".

* * 8 *

CHAPTER 1311 BOARD OF BUILDING CODE APPEALS

(ordinances printed at pp. 22-24, Appellee's Brief)

* * *

1313.03 REQUIRED FACILITIES; CELLAR ROOMS, INGRESS AND EGRESS; COOKING PROHIBITED; HOUSING CODE COMPLIANCE.

No owner or tenant shall rent to roomers or operate a rooming house, foster home or hotel unless the premises and rooms so used shall comply with the following requirements:

(a) The premises must be equipped with one complete bathroom with toilet, lavatory and bathtub or shower facilities for each six persons or fraction thereof living in the premises, including all roomers, employees and members of families of the owner or tenant.

(b) No room located in a cellar shall be used for roomers or for rooming house, foster home or hotel purposes.

(c) The means of egress to the outside of the premises from any room shall meet with the approval of the Building Inspector and shall at all times be kept clear of obstructions. Any door which must be used in connection with such means of egress shall be provided with a lock which can be opened from the inside without the use of a key.

(d) No hot plates or other facilities for cooking are permitted in any rooms rented to a roomer except with the specific approval of the Board of Zoning Appeals.

(e) The building shall be operated and maintained in complete compliance with all provisions of the Housing Code of the City. (Ord. 5513. Passed 11-6-63.)

(f) No means of ingress to a bathroom shall be through a room rented to a roomer. No means of ingress to a room rented to a roomer shall be through any room rented to any other roomer. (Ord. 5801. Passed 2-21-67.)

1313.04 RENTING TO MINORS UNDER 12 OR THE AGED.

No owner or tenant shall rent any premises to be occupied by a roomer who is under twelve years of age or is infirm or aged, except with the approval of the Board of Zoning Appeals. Under no condition shall the Board approve a person as a roomer who in an emergency is unable to evacuate the building easily and readily without help and without impeding the progress of others; nor shall the Board permit any child under twelve years of age to occupy any part of the third floor of any dwelling unless such child is a member of the family of the owner or lessee who, with the remainder of his family, is domiciled on another floor of the dwelling. (Ord. 5513. Passed 11-6-63.)

9

1313.05 LICENSE REQUIRED; EXPIRATION.

No owner or tenant shall operate any rooming house, foster home or hotel within the City without having first applied for and obtained from the City Manager a license entitling him to do so, which license shall be valid until December 31 of the year in which it is granted.

* * *

TITLE FIVE - HOUSING CODE

CHAPTER 1341 DEFINITIONS.

1341.08 FAMILY

(ordinance printed at pp. 2-3, Appellant's Brief)

* * *

1343.01 TITLE.

Ordinance 5320, passed March 21, 1961, as amended, which is codified as this Title Five of Part Thirteen - Building Code, and hereinafter referred to as "this Housing Code," shall be known as the "Housing Code of the City of East Cleveland." (Ord. 5320. Passed 3-21-61.)

1343.02 PURPOSE.

Within the scope of this Housing Code as hereinafter defined, the purpose of this Housing Code is: to establish minimum standards necessary to make all dwelling structures safe, sanitary, free from fire and health hazards, and fit for human habitation and beneficial to the public welfare; to establish minimum standards governing the maintenance of dwelling structures in such condition as will not constitute a blighting or deteriorating influence on the neighborhood and the community; to protect property values and to maintain the character and appearance of the community and neighborhoods within the community; to fix responsibilities for owners and occupants of dwelling structures with respect to sanitation, repair and maintenance; to establish additional standards for multiple dwellings; to authorize the inspection of dwelling structures; to establish enforcement procedures; to authorize the vacation or condemnation of dwelling structures unsafe or unfit for human habitation, and to fix penalties for violations.
(Ord. 5717. Passed 4-5-66.)

1343.03 GENERAL SCOPE.

The provisions of this Housing Code shall be supplementary to all other provisions of the ordinances of the City relating to the construction, use and maintenance of residential buildings and shall apply to all buildings or portions thereof, excepting hotels as defined in Section 1341.10 which are used or designated or intended to be for residential occupancy.

* * *

1343.04 COMPLIANCE.

The owner, as defined in Section 1341.14, shall be responsible for compliance with all of the provisions of this Housing Code except where the responsibility therefor is specifically placed elsewhere.
(Ord. 5432. Passed 11-20-62.)

* * *

1345.03 NOTICE OF VIOLATION.

(a) Whenever the Building Inspector and other City department heads and their representatives find any dwelling structure or premises, or any part thereof, to be in violation of the provisions of this Housing Code, the Building Inspector shall give or cause to be given or mailed to the owner or operator of such structure or premises a written notice stating the violations therein. Such notice shall order the owner or operator, within a stated reasonable time, to repair, improve or demolish the structure or premises concerned. Such delivery or mailing shall be deemed legal service of notice.

* * *

1345.04 NONCOMPLIANCE WITH NOTICE.

(a) Whenever the owner, agent, occupant or operator of a structure or premises fails, neglects or refuses to comply with any notice of the Building Inspector, the Building Inspector may issue a notice to such owner, agent, occupant or operator ordering the structure or premises, or part thereof, to be vacated, or he may advise the Director of Law of the circumstances and request the Director of Law to institute an appropriate action at law to compel compliance, or both. Such notice shall be delivered, mailed or posted in the same manner as provided in Section 1345.03.

* * *

1345.08 BOARD OF BUILDING CODE APPEALS.

The Board of Building Code Appeals, as established by Chapter 1311, shall be the Board of Appeals for this Housing Code and its powers and duties and the procedures for appeal shall be as provided in Chapter 1311.
(Ord. 5642. Passed 6-1-65.)

* * *

1345.99 PENALTY.

Whoever violates any provision of this Housing Code or any rule or regulation promulgated hereunder or fails to comply herewith or with any written notice or written order issued hereunder, or whoever refuses to permit entry by the Building Inspector or other City department heads or their representatives at a reasonable hour, and whoever interferes with, obstructs or hinders such Building Inspector, other City department heads or their representatives while attempting to make such inspection shall be fined not more than one thousand dollars ($1,000) and imprisoned for six months for each offense. Each day such violation occurs or continues shall constitute a separate offense. (Ord. 5717. Passed 4-5-66.)

CHAPTER 1351 BASIC STANDARDS FOR RESIDENTIAL OCCUPANCY.

* * *

1351.02 LIMITATION ON OCCUPANCY.

The occupancy of any dwelling unit shall be limited to one, and only one, family and to any authorized persons occupying such dwelling unit with such family. (Ord. 5587. Passed 11-17-64.)

1351.03 HABITABLE FLOOR AREA.

(ordinance printed at p. 3 of Appellant's Brief)

1351.04 SLEEPING ROOMS.

Every room used for sleeping purposes shall contain not less than seventy square feet of habitable floor area if used for one occupant and not less than fifty square feet of habitable floor area per occupant if used by more than one occupant. (Ord. 5802. Passed 2-21-67.)

* * *